No. 04-983

Supreme Court, U.S.
FILED
JAN 19 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOE ARPAIO,
Maricopa County Sheriff, in his official capacity,
Petitioner,

v.

JAMIE DEMERY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 19, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Ninth Circuit correctly held that a county sheriff who installed video cameras that broadcast images over the internet of the booking and detention process in the public area of a jail violated the substantive due process rights of pre-trial detainees?

PARTIES TO THE PROCEEDING

Petitioner is Sheriff Joe Arpaio, an elected official of Maricopa County in the State of Arizona. Maricopa County was a party in the trial court below, but was not a party in the Ninth Circuit and is not a party to this petition.

Respondents are former pretrial detainees at the Maricopa County Jail who sought an injunction, alleging that broadcasting their images over the internet violated their due process rights. They are: Jamie Demery; Samantha Moore; Aracelia Leticia Pfeifer; Janet Lee King; Jerri Cabaniss; Rosa Velazquez; Cynthia Matthews; Rhonda Farmer; Sandra Puebla; Jordan Martin; Laura Hartney; Elena M. Irvine; Yvette Rose Leon; Tina Marie Sox; Loretta Christie; Alison Lee Adair; Victoria Zepeda; Nikisha Calliste; Terry McEvoy; Tom Odenkirk; Dean Tousignant; Benny David Berryman; Damon Scoggin, and Sean Botkin.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sheriff Joe Arpaio respectfully seeks a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION AND JUDGMENT BELOW

The order of the court of appeals denying the petition for rehearing en banc is unreported and is reprinted in the Appendix to this Petition ("App.") at 58a. The underlying opinion of the court of appeals is reported at 378 F.3d 1020 (App. 1a-36a). The decision of the district court granting the respondents' requested preliminary injunction is unreported (App. 37a-57a).

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on August 6, 2004, and the order of the court of appeals denying the petition for

rehearing en banc was entered on October 21, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment prohibits the imposition of conditions of confinement on pretrial detainees that constitute "punishment." It provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

INTRODUCTION

This case stems from Sheriff Joe Arpaio's installation of four internet video cameras in the public intake area of the Madison Street Jail in Phoenix, Arizona. The "webcams" streamed to the internet live 24-hour images of the intake, booking, search, and holding cell areas of the jail. Sheriff Arpaio installed these webcams for three reasons: (1) exposing the viewing public to the jail's detention procedures deters the viewing public from committing crimes; (2) the detainees' knowledge that the public—including potentially family and friends—could watch them being processed deterred the detainees from misbehaving, thus improving security at the jail; and (3) by opening up the jail's operations to public inspection, the webcams enhanced accountability to the taxpaying public regarding how the County Jail is operated. Plaintiffs, former pre-trial detainees whose images were depicted over the internet during the booking and detainment process, complained that this depiction violated their due process rights.

Under the Due Process Clause, a pre-trial detainee may not be punished prior to an adjudication of guilt. *Bell v. Wolfish*, 441 U.S. 520 (1979). The government may certainly detain an arrestee to ensure his presence at trial. *Bell*, 441 U.S. at

536. It may also subject him to the restrictions and conditions of the detention facility, as long as those conditions do not amount to punishment, or otherwise violate the Constitution; and it may impose conditions that are reasonably related to the institution's interest in maintaining jail security. *Id.* at 536-37, 540. Under *Bell*, as long as a particular condition of pretrial detention is "reasonably related to a legitimate governmental objective," it does not, without more, amount to "punishment." *Id.* at 539. Conversely, if a restriction or condition is not reasonably related to a legitimate goal – if it is arbitrary or purposeless – a court may infer that the purpose of the governmental action is impermissible punishment. *Id.* The issue for the Ninth Circuit majority was whether Sheriff Arpaio's reasons for installing the webcams are "reasonably related to a legitimate governmental objective."

Applying *Bell*, the court held that the webcams were not reasonably related to any legitimate, governmental objective. App. 15a-17a, 18a. This holding conflicts with cases from this Court and federal circuits, which have ruled that deterrence of the viewing public and transparency of the criminal justice system are, indeed, legitimate governmental interests, and that disseminating truthful arrest and conviction information—even over the internet—is reasonably related to those interests. *See Smith v. Doe*, 538 U.S. 84, 97-103 (2002) (upholding Alaska's sex offender notification law as not constituting punishment under Ex Post Facto clause); *Caldarola v. County of Westchester*, 343 F.3d 570, 576 (2nd Cir. 2003) (upholding validity of perp walks—the practice of parading an accused before the media as he is brought to the courthouse for processing—against constitutional attack; such practice serves important non-punitive purposes of enhancing transparency of the criminal justice system, deterring others from crime, and protecting individuals from police abuse and protecting police from false accusations of abuse). It also conflicts with cases recognizing that deterring detainees from violating jail rules is a legitimate governmental objective.

Collazo-Leon v. U. S. Bureau of Prisons, 51 F.3d 315, 318 (1st Cir. 1995).

The Ninth Circuit also held that the detainees' embarrassment at having their real-time booking processes subject to observation by the viewing public was a harm of constitutional magnitude. App. 13a-14a. This holding, too, conflicts with this Court's pronouncement that reputational stigma alone does not rise to the level of constitutional harm. *Paul v. Davis*, 424 U.S. 693, 701, 712 (1976) (dissemination to local merchants of a flyer identifying a shoplifting arrestee as an "Active Shoplifter" did **not** rise to the level of constitutional harm, even though the arrestee had not been, and in fact never was convicted of shoplifting). Of plaintiff's claim that publishing a record of an official act such as an arrest violated his substantive due process rights, the Court said, "[n]one of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner." 424 U. S. at 714.

The Ninth Circuit's finding of harm from the webcasts also conflicts with the federal court cases holding that disseminating accurate criminal record information that is already in the public domain does *not* constitute punishment. *See, e.g., Smith v. Doe*, 538 U.S. 84, 98-99 (2002) ("Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment"); *Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997) ("The [sex offender] information collected and disseminated by the Washington statute is already fully available to the public and is not constitutionally infirm"), *cert. den.* 523 U.S. 1007 (1998); *E.B. v. Verniero*, 119 F.3d 1077, 1099-1100, 1103-04 (3rd Cir. 1997) (New Jersey's dissemination of public record information about criminal history is not punishment when done in furtherance of legitimate governmental interest). Further, this Court has already ruled that the fact that such publication occurs over

the internet does not turn permissible conduct into unconstitutional punishment. *Smith*, *supra*, at 99 ("The fact that Alaska posts the information on the Internet does not alter our conclusion"). *See also Femedeer v. Haun*, 227 F.3d 1244, 1250-51 (10th Cir. 2000) ("Internet notification works merely a technological extension, not a sea change, in our nation's long history of making information public regarding criminal offenses"). The Ninth Circuit's ruling that it was the "exponential increase" in the number and kind of people observing the detainees over the internet that amounted to punishment under *Bell*, App. 14a, directly conflicts with this authority.

Finally, the Ninth Circuit held that Bell's "punishment" test was the correct test for assessing the constitutionality of the webcams. App. 10a-11a. It is not at all clear, however, that this is the correct test. Eight years after *Bell*, this Court in *Turner v. Safley*, 482 U.S. 78 (1987), examined the constitutionality of a prison's mail and marriage regulations using a new four-factor "rational relation" test. 482 U.S. at 89. While *Turner* itself involved convicted prisoners and not detainees, it cited several times to *Bell*—a detainee case—in developing its standard, *see Turner*, 482 U.S. at 87-89, and indicated that *Bell* had been a stepping stone to the development of this new test:

> If *Pell*, *Jones*, and *Bell* have not already resolved the question posed in *Martinez*, we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations."

482 U.S. at 89. *Bell* in turn had already indicated that there was "no reason" to distinguish between pretrial detainees and convicted inmates in reviewing challenged security practices, since there is "no basis for concluding that pretrial detainees

pose any lesser security risk than convicted inmates." *Bell*, 441 U.S. at 546, n.28.

This lack of clarity has caused a split in the circuits regarding which test to apply to detainees' conditions of confinement claims. *Compare Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004); *Valdez v. Rosenbaum*, 302 F.3d 1039 (9th Cir. 2002), *cert. den.* 538 U.S. 1047 (2003); *Benjamin v. Fraser*, 264 F.3d 175, 187 n.10 (2nd Cir. 2001); and *Tesch v. County of Green Lake*, 157 F.3d 465, 475 (7th Cir. 1998) (applying *Bell*), *with Mauro v. Arpaio*, 188 F.3d 1054, 1058-59 (9th Cir. 1999) (*en banc*), *cert den.* 529 U.S. 1018 (2000); *Hause v. Vaught*, 993 F.2d 1079, 1081-82 (4th Cir. 1993), *cert den.* 510 U.S. 1049 (1994); and *Covino v. Patrissi*, 967 F.2d 73 (2nd Cir. 1992) (applying *Turner*). Clearly, lower courts need guidance on which test to apply to pre-trial detainees' constitutional conditions of confinement claims.

STATEMENT OF THE CASE

On or about July 27, 2000, Maricopa County Sheriff Arpaio ordered the installation of four internet video cameras in the intake area of the Madison Street Jail. Three of the cameras were directed at processing areas while one was directed at a portion of a holding cell, broadcasting images of approximately two-thirds of the cell. A sign alerted pretrial detainees and others entering the jail through Central Intake that the area was under video surveillance and that their images could be broadcast over the internet. In addition, a sign posted in the holding cell area advised detainees that they were under video and audio surveillance while in the holding cells and that their images could be broadcast over the internet.

The Sheriff's Office coordinated with Crime.com to provide the internet videocamera feed to the Crime.com website. Crime.com did not pay the Sheriff's Office for its

use of the video images, and the Sheriff's Office did not receive any monetary compensation or commercial benefit from it.

Jail employees avowed that the webcams served three purposes: (1) exposing the viewing public to the jail's detention procedures deters the viewing public from committing crimes; (2) the detainees' knowledge that the public—including potentially family and friends—could watch them being processed deterred the detainees from misbehaving, thus improving security at the jail; and (3) by opening up the jail's operations to public inspection, the webcams enhanced accountability to the taxpaying public regarding how the County Jail is operated. Plaintiffs—former pretrial detainees at the jail—sought an injunction in state court, alleging that broadcasting their images over the internet violated their constitutional right to privacy. Defendants Maricopa County and Sheriff Arpaio removed the case to federal court, which had federal question jurisdiction under 28 U.S.C. § 1331.

After the preliminary injunction hearing, the trial court, Hon. Earl Carroll, ruled that there was a constitutional violation, but not on the privacy grounds that plaintiffs had argued. Discussing only Sheriff Arpaio's security goal, and not his deterrence or accountability goals, the court reasoned *sua sponte* that the webcams were an "exaggerated response to an already-filled security need," and thus constituted "punishment" before an adjudication of guilt in violation of plaintiffs' substantive due process rights—an argument never made by plaintiffs. App. 42a, 54a-55a.[1]

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[1] Sometime after the action was filed but before any injunction was issued, Crime.com ceased carrying the live feed from the jail due to financial problems. The Sheriff's Office, however, continues to seek a new host for the site and, if successful in obtaining a reversal of the preliminary injunction, will attempt to reach an agreement with another entity to continue the webcasting from the four cameras positioned in the jail.

In a published opinion, Judges Paez and Berzon on the Ninth Circuit's panel affirmed. They first held that Crime. com's cessation of operations did not render the case moot, because the Sheriff unequivocally intends to find another web host, and as such, the issues were likely to recur. App. 5a-9a.

Next, the majority held that the district court had correctly used the *Bell v. Wolfish*, 441 U.S. 520, 535 (1979), "punishment" test rather than the *Turner v. Safley* "rational relation" test for three reasons. App. 10a-11a. First, the court said that Ninth Circuit precedent required it to apply *Bell*, not *Turner*. App. 11a. Second, *Turner* was inapplicable because it dealt with convicted prisoners and not detainees, *id.*—though *Bell* itself had found "no reason" to make such a distinction. Third, *Turner* involved an Eighth Amendment challenge instead of a Fourteenth Amendment challenge, *id.* —though as a practical matter the standard has been the same for conditions of confinement claims. *See e.g. Whitnack v. Douglas County*, 16 F.3d 954, 957 (8th Cir. 1994) (legal standard applied to pretrial detainee's conditions of confinement claim is identical to the legal standard applied to convicted prisoner's conditions-of-confinement claim).

Applying *Bell*, the Ninth Circuit majority used a two-part test: "For a particular governmental action to constitute punishment, (1) that action must cause the detainee to suffer some harm or 'disability,' and (2) the purpose of the governmental action must be to punish the detainee." App. 12a-13a. It then held that plaintiffs had been "harmed" (apparently to a constitutional degree) because (1) "Exposure to millions of complete strangers, not to mention friends, loved ones, co-workers and employers, as one is booked, fingerprinted, and generally processed as an arrestee, and as one sits, stands, or lies in a holding cell, constitutes a level of humiliation that almost anyone would regard as profoundly undesirable and strive to avoid," App. 13a; and (2) "The

webcams increase exponentially the number of people observing detainees, and also alter drastically the classes of people who can watch the detainees." App. 14a.

Next, the majority held that this "harm" was not incident to any legitimate governmental purpose. App. 14a-17a, 18a. Instead of determining whether the webcams could reasonably deter viewers, could reasonably improve security, or could reasonably enhance the transparency of jail operations, the court held that:

> (1) the webcams "did not improve security" because closed-circuit cameras were already present and jail personnel were already watching, App. 14a. Yet it was the prospect of being watched by family, friends, employers and co-workers that caused the harm to be of constitutional magnitude, according to the court; and
>
> (2) deterrence of the viewing public was not legitimate because "retribution and deterrence are not legitimate nonpunitive governmental objectives." App. 15a-16a. But here the court only cited cases rejecting as a goal the deterrence of the *detainees themselves*. *Id.* The court did not cite any cases like the perp walk cases that addressed the legitimate goal of deterring the *viewing public*; and
>
> (3) the Sheriff's accountability and public scrutiny goal was not legitimate because, "we fail to see how turning pretrial detainees into the unwilling objects of the latest reality show" serves the goals of administering the facility, guaranteeing detainees' attendance at trial, or promoting prison safety. App. 16a. The only direct mention the court made of Sheriff Arpaio's accountability objective was to state that such goal did not justify the "broad public exposure of pretrial detainees' intimate circumstances," citing *Wilson v. Layne*, 526 U.S. 603, 612 (1999) (allowing the press to accompany a valid search violates a homeowner's Fourth Amendment right to be secure in the sanctity of his home). App. 17a.

> Of course, unlike one's home, there is no right to sanctity in a public jail. And there is nothing "intimate" or private about a booking process that is a matter of public record.

The Ninth Circuit majority concluded, "the webcams are not reasonably related to a non-punitive purpose." App. 18a.

One judge dissented. Citing *Turner v. Safley*, Judge Bea noted that, "Given the importance and difficulty of fulfilling the responsibility of operating penological installations, courts have taken an understandably cautious approach to second-guessing the decisions of prison administrators." App. 23a. Finding this precept "no less applicable in the context of jails and detention facilities," App. 24a, Judge Bea stated that the relevant inquiry was *Turner*'s reasonable relation test. App. 24a-25a. "There is nothing in *Turner*," he said, "which limits this principle solely to convicted prisoners, as the majority opinion claims." App. 27a, n.4.

Judge Bea next stated that the majority gave "needlessly short shrift to the governmental objectives proffered by Sheriff Arpaio." App. 25a. He reasoned that broadcasting pictures of detention facilities would rationally deter viewers from conduct that might land them there. App. 25a. In addition, webcasts provide transparency to governmental operation of the facility as much as group tours would. App. 25a-26a. Webcasts also deter the filing of frivolous lawsuits against the county and county officials. App. 26a. Finally, Judge Bea believed that the shame attendant to publication of detainees' arrests was not a harm of constitutional magnitude. App. 29a-30a, citing *Paul v. Davis, supra*.

Judge Bea analogized this case to the Second Circuit's perp walk cases, because "perp walks promote many of the same governmental purposes put forward here by Sheriff Arpaio," App. 30a-32a; and to the sex offender registration cases. App. 32a-33a. He concluded that the district court's injunction was improperly based on "the legally erroneous

conclusion that all levels of possible shame constitute constitutionally prohibited 'punishment,' without any consideration of the factors discussed in *Bell*." App. 36a.[2]

Sheriff Arpaio filed a petition for rehearing en banc, which was denied on October 21, 2004. App. 58a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's opinion that Sheriff Arpaio's webcams violate the detainees' substantive due process rights conflicts with existing Supreme Court and federal circuit authority in at least three major ways. First, the Ninth Circuit's holding that the webcams are not reasonably related to a legitimate non-punitive objective conflicts with this Court's ruling in *Smith v. Doe*, 538 U.S. 84, 97-103 (2002) and other federal circuits holding that enhancing transparency of the criminal justice system and deterring the viewing public are legitimate governmental objectives, and that disseminating accurate public criminal record information, even over the internet, is reasonably related to those objectives. *Caldarola v. County of Westchester*, 343 F.3d 570, 576 (2nd Cir. 2003); *E.B. v. Verniero*, 119 F.3d 1077, 1099-1100 (3rd Cir. 1997).

Second, the Ninth Circuit's ruling that disseminating images of the booking and detainment process over the internet caused plaintiffs harm of constitutional magnitude conflicts with this Court's holding in *Paul v. Davis*, 424 U.S. 693 (1976), that reputational harm alone is not a harm that the due process clause remedies; and it conflicts with this Court's ruling in *Smith v. Doe, supra*, and in other federal circuit cases that it is not unconstitutional punishment to disseminate

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[2] Judge Bea also indicated that he would have reversed the injunction on mootness grounds because plaintiffs, who were no longer detainees, could not show a sufficient likelihood that they (as opposed to others) would be arrested and detained at the Madison Street Jail in the future. App. 20a-23a.

already-public information about a person's arrest and/or conviction. *Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997), *cert den.* 523 U.S. 1007 (1998); *E.B. v. Verniero*, 119 F.3d 1077, 1099-1100, 1103-04 (3rd Cir. 1997). Further, the court's intimation that publication over the internet makes the governmental response "excessive" also conflicts with this Court's ruling in *Smith v. Doe, supra*, and the Tenth Circuit's ruling in *Femedeer v. Haun*, 227 F.3d 1244, 1250-51 (10th Cir. 2000) that publication of truthful criminal history information over the internet does not turn constitutional regulation into unconstitutional punishment.

Third, circuit courts are split on whether the correct test to apply to detainees' conditions of confinement claims is the *Bell* "punishment" test or the *Turner* "rational relation to legitimate penological interests" test. *See e.g. Simmons v. Sacramento County Superior Court*, 318 F.3d 1156 (9th Cir. 2003) (applying *Bell*); *Covino v. Patrissi*, 967 F.2d 73 (2nd Cir. 1992) (applying *Turner*); *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004) (applying *Bell*); *Tesch v. County of Green Lake*, 157 F.3d 465, 475 (7th Cir. 1998) (suggesting that *Bell* applies); *Hause v. Vaught*, 993 F.2d 1079, 1081-82 (4th Cir. 1993) (applying *Turner*), *cert den.* 510 U.S. 1049 (1994).

I. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUITS HOLDING THAT DISSEMINATION OF TRUTHFUL ARREST/CONVICTION INFORMATION IS REASONABLY RELATED TO LEGITIMATE GOALS OF DETERRING THE PUBLIC AND ENHANCING THE TRANSPARENCY OF THE CRIMINAL JUSTICE SYSTEM

A condition of pretrial detention that is "reasonably related to a legitimate governmental objective" does not, without more, amount to "punishment." *Bell v. Wolfish*, 441 U.S.

520, 539 (1979). Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court may infer that the purpose of the governmental action is impermissible punishment. *Id.*

To make this determination, *Bell* directs lower courts to "decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538. Absent a showing of an expressed intent to punish by the detention facility officials—as is the case here—that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Id.* Even if a condition may be viewed as having a punitive effect on the pretrial detainee, it is nonetheless constitutional if it also furthers **some** legitimate governmental objective. *Collazo-Leon v. United States Bureau of Prisons*, 51 F.3d 315, 318 (1st Cir.1995) (citing *Bell*). *Bell* cautions courts to "heed our warning that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Id.* at 540, n.23.[3]

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[3] *See also Smith v. Doe*, 538 U.S. at 105 (Court does not determine whether the legislature made the best choice possible to address the problem it sought to remedy; question is whether the regulatory means chosen were reasonable in light of the non-punitive objective); *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999) ("it does not matter whether we agree with the defendants or whether the policy in fact advances the jail's legitimate interests. . . The only question that we must answer is whether the defendants' judgment was "rational," that is, whether the defendants might reasonably have thought that the policy would advance its interests"); *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 646 (5th

A. The Ninth Circuit's decision conflicts with federal decisions holding that disseminating truthful information about arrests and convictions is reasonably related to legitimate governmental interests in deterring the public and enhancing the transparency of the criminal justice system.

Deterring the viewing public and enhancing the transparency of the system by depicting real-time images of the public booking process were two stated goals for installing the webcams. These are clearly legitimate governmental interests; and federal cases hold that disseminating truthful criminal history information is reasonably related to these legitimate governmental interests. The Ninth Circuit's decision that the webcams are not reasonably related to a non-punitive purpose cannot be reconciled with these decisions.

In *Caldarola v. County of Westchester*, 343 F.3d 570, 576 (2nd Cir. 2003), for example, plaintiffs—like the pre-trial detainees here—had claimed that perp walks (the practice of parading an accused before the media as he is brought to the courthouse for processing) caused them "humiliation . . . without any legitimate law enforcement objective or justification." *See Caldarola v. County of Westchester,* 142 F. Supp.2d 431, 436 (S.D.N.Y. 2001). The Second Circuit held the practice constitutional, stating that it serves important non-punitive governmental purposes—including informing the public about the government's efforts to stop the crime of which the arrestee was accused; enhancing the transparency of the criminal justice system; deterring others from attempting similar crimes; and protecting individuals from police abuse and protecting police from false accusations of abuse (citing as an example the practice of installing video equipment on police cruisers to record interactions between

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Cir.1996) (*Bell* test "is deferential to jail rulemaking; it is in essence a rational basis test of the validity of jail rules").

police officers and individuals pulled over in traffic stops). 343 F.3d at 576.[4] The webcams serve the same legitimate governmental purposes.

Similar legitimate governmental reasons have led every court addressing the issue to uphold sex offender notification laws against claims that the public dissemination of conviction information constitutes unconstitutional punishment. In *Smith v. Doe*, 538 U.S. 84, 97-99 (2002), the Court rejected the claim of convicted sex offenders that the notification provisions of Alaska's Megan's Law "resemble shaming punishments of the colonial period." The Court reasoned that not only is the dissemination of accurate information about an already-public criminal record not punishment, but "criminal law tradition insists on public indictment, public trial, and public imposition of sentence." *Id.* at 99. "Transparency," said the Court, "is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused." *Id.* In *E.B. v. Verniero*, 119 F.3d 1077, 1100 (3rd Cir. 1997), the Third Circuit had earlier held the same thing, stating that the dissemination of accurate public record information about past criminal activities "'heightens public respect for the judicial process,' it 'permits the public to . . . serve as a check on the judicial process,' and it 'plays an important role in the . . . free discussion of governmental affairs.'"[5] *See also Houchins v. KQED, Inc.*, 438 U.S. 1, 8

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[4] Contrast this with purely staged perp walks—"fictional dramatizations of an event that transpired hours earlier"—which have no legitimate non-punitive purpose. *Lauro v.Charles*, 219 F.3d 202 (2d Cir.2000).

[5] While the Megan's Law [sex offender registration] cases deal with the publication of convictions and not arrests, the question—whether publication constitutes punishment—is the same, and courts analyze the same factors in making that determination for the convicted and the detained alike. *See e.g. Hatton v. Bonner*, 356 F.3d 955, 963 (9th Cir. 2004) (examining *Kennedy v. Mendoza-Martinez* factors to determine if

(1978) (holding that television stations do not have a First Amendment right to access jail facilities when they so desire, but stating that jail conditions are matters of public importance and that the media, being the eyes and ears of the public, "can be a powerful and constructive force, contributing to remedial action in the conduct of public business").[6]

In fact, the *Houchins* Court described a number of alternatives available to ensure public scrutiny—including citizen task forces and prison visitation committees; judicial inquiry; and the legislative power. *Id.* at 9. Today—nearly thirty years after *Houchins*—modern day webcams placed in the public sections of the jail's intake area are as legitimate a method of ensuring public scrutiny of jail conditions as citizen task forces and prison visitation committees.

B. Legitimate governmental conduct can also deter without being punitive.

The Ninth Circuit dismissed Sheriff Arpaio's deterrence goals as not legitimate by simply quoting the oft-repeated precept that "'retribution and deterrence are not legitimate nonpunitive governmental objectives' that can justify adverse conditions of detention for pretrial detainees," because "deterrence is one of 'the traditional aims of punishment'."

California's Megan's Law is punishment in violation of Ex Post Facto clause) and *Bell*, 441 U.S. at 538-39 (examining *Kennedy v. Mendoza-Martinez* factors to determine if jail conditions are punishment in violation of substantive due process).

[6] The media asserted that public access to penal institutions was necessary to prevent officials from concealing prison conditions from the voters and impairing the public's right to discuss and criticize the prison system and its administration. 438 U.S. at 8. While acknowledging the legitimacy of the public interest involved, the Court disagreed with the media's assertion of a First Amendment right, saying, "The media are not a substitute for or an adjunct of government and, like the courts, they are ill equipped to deal with problems of prison administration." *Id.*

App. 15a. To be sure, deterrence and retribution *of an accused* for committing a crime of which he has not yet been convicted would not be a legitimate goal. *See Bell*, 441 U .S. at 539, n.20, citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). But deterrence of the viewing public *is* a legitimate governmental objective. *Caldarola, supra.*

Furthermore, Sheriff Arpaio's desire to deter detainees from misbehaving at the jail does not render his purpose illegitimate or punitive. While *punishment* is usually imposed in part *to deter* the wrongdoer from future similar behavior, this Court has made clear that the opposite is not necessarily true: just because government conduct might *deter* someone does not *a fortiori* establish that it is done to *punish*. *See Smith v. Doe*, *supra*, 538 U.S. at 102 (rejecting sex offenders' argument that because deterrence is one purpose of punishment, the fact that Alaska's Megan's Law might deter registrants from future crime makes the law punitive):

> This proves too much. Any number of governmental programs might deter crime without imposing punishment. 'To hold that the mere presence of a deterrent purpose renders such sanctions "criminal" . . . would
>
> severely undermine the Government's ability to engage in effective regulation.

Contrary to the Ninth Circuit's holding, deterring pre-trial detainees from misbehaving at the jail is a legitimate governmental interest that does not violate the precepts of *Bell*. *Collazo-Leon v. U. S. Bureau of Prisons*, 51 F.3d 315, 318 (1st Cir. 1995) (recognizing *Bell*'s "clear approval of a broad exercise of discretion by prison authorities to take reasonable and necessary action, including punishment, to enforce the prison disciplinary regime and to deter even pretrial detainees from violation of its requirements").

C. Internet publication is a modern-day technological convenience, not an excessive response to a legitimate purpose.

In this day and age, dissemination of detainees' images over the internet is not an "excessive response to a legitimate purpose," as the Ninth Circuit seemed to intimate. App. 13a, 15a. In *Smith v. Doe*, this Court held that "the fact that Alaska posts the [sex offender] information on the Internet does not alter our conclusion" that community notification was not punishment. 538 U.S. at 99. The Court reasoned that the state's web site did not add to the public record comments shaming the offender. Further, like here, the viewing public had to take affirmative steps of going to the Department's web site and looking up the desired information. The Court found the process

> more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry.

Id. In so holding, this Court rejected the same concern voiced by the Ninth Circuit in *Smith* that the Ninth Circuit has again voiced here:

> The Court of Appeals' reliance on the wide dissemination of the information is also unavailing. The Ninth Circuit highlighted that the information was available 'world-wide' and '[b]roadcas[t]' in an indiscriminate manner. . . As we have explained, however, the notification system is a passive one. An individual must seek access to the information.
>
> * * *
>
> The excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to

> address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective. The Act meets this standard.

538 U.S. at 104-105. *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000) is in accord. Holding that Utah's internet dissemination of sex offender registration information was not punishment, the court reasoned that the information

> is made widely available, but it is not broadcast in a manner approaching the historical examples of public shaming. Interested individuals must still make an affirmative effort to retrieve the information. Internet notification works merely a technological extension, not a sea change, in our nation's long history of making information public regarding criminal offenses.

227 F.3d at 1251. The Ninth Circuit's ruling that the web-cams are no more than an excessive form of "colonial shaming" cannot be reconciled with this authority. They are a modern day innovative response to legitimate governmental concerns.

II. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUITS HOLDING THAT THE DUE PROCESS CLAUSE DOES NOT REDRESS CLAIMS OF REPUTATIONAL HARM; AND IT IS NOT UNCONSTITUTIONAL PUNISHMENT TO DISSEMINATE PUBLIC RECORD ARREST OR CONVICTION INFORMATION

A. Reputational harm is not an injury that is constitutionally redressible.

The Ninth Circuit found the detainees harmed by the humiliation of having their booking procedures exposed to "millions of strangers, not to mention friends, loved ones, co-

workers and employers." App. 13a. But "[n]ot every disability imposed during pretrial detention amounts to punishment in the constitutional sense." *Bell,* 441 U.S. at 537. In *Paul v. Davis*, 424 U.S. 693 (1976), this Court held that the dissemination to local merchants of a flyer identifying a shoplifting arrestee as an "Active Shoplifter" did **not** rise to the level of constitutional harm, even though the arrestee had not been, and in fact never was convicted of shoplifting. The Court reasoned that reputational stigma imposed by official action by itself was an insufficient basis for invoking the due process clause. 424 U.S. at 701, 712.[7] Of plaintiff's claim that publishing a record of an official act such as an arrest violated his substantive due process rights, the Court said, "[n]one of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner." 424 U. S. at 714. *See also E.B. v. Verniero*, 119 F.3d 1077, 1103 (3rd Cir. 1997) (New Jersey's publication of registrants' convictions does not implicate any interest of fundamental constitutional magnitude"). Indeed, every federal circuit has recognized that reputational harm is not constitutionally redressible.

Here, similarly, the reputational stigma or embarrassment associated with being depicted over the internet during the booking process was the heart of plaintiffs' complaint. If a *defamatory* publication relating to a detainee's arrest does not rise to the level of constitutional harm, it is difficult to see how a *truthful* publication does. Furthermore, if it is the prospect of having friends, neighbors, and family watch the detainee that the court believed raised the detainees' shame or embarrassment "harm" to a constitutional level, then certainly it is legitimate for Sheriff Arpaio to reasonably expect that same prospect of having friends, neighbors, and family

[7] The Court also found that the dissemination of plaintiff's name and photograph did not implicate any constitutional right to privacy. *Id.* at 713.

watching the detainees in the jail will deter them from misbehaving at the jail more than just having the prison guards nearby.

B. Disseminating accurate public record information is not punishment.

Judges Paez and Berzon believed that plaintiffs were harmed by the "broad public exposure of pretrial detainees' intimate circumstances." App. 17a. But there is nothing "intimate" about being booked into a public jail. *See Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (detainees have no legitimate expectation of privacy in a jail cell). To the contrary, federal courts uniformly hold that disseminating accurate public information regarding criminal history does *not* constitute punishment. *See, e.g., Smith v. Doe*, 538 U.S. 84, 98-99 (2002); *E.B. v. Verniero*, 119 F.3d 1077, 1099-1100, 1103-04 (3rd Cir. 1997). In each of these Megan's Law cases, the courts rejected the argument that disseminating criminal history information that was already part of the public domain was unconstitutional punishment. The *Smith* Court stated:

> Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.

538 U.S. at 98-99. The court in *E.B. v. Verniero*, 119 F.3d 1077, 1100 (3rd Cir. 1997) stated, "[O]ur laws' insistence that information regarding criminal proceedings be publicly disseminated is not intended as punishment and has never been regarded as such." The Ninth Circuit's conclusion that disseminating truthful images of a public booking process harmed plaintiffs conflicts with these authorities.

III. THE FEDERAL CIRCUITS ARE SPLIT ON WHETHER TO APPLY *BELL*'S "PUNISHMENT" TEST OR *TURNER V. SAFLEY*'S "REASONABLE RELATION TO LEGITIMATE PENOLOGICAL INTERESTS" TEST TO PRETRIAL DETAINEES' CONDITIONS OF CONFINEMENT CLAIMS

In *Bell v. Wolfish*, 441 U.S. 520 (1979), pre-trial detainees challenged the constitutionality of numerous conditions of confinement and practices in a federally operated short-term custodial facility. The Court held that to evaluate the constitutionality of conditions or restrictions of pretrial detention, "we think that the proper inquiry is whether those conditions amount to punishment of the detainee." *Id.* at 535. The Court acknowledged, however, that it saw "no reason" to distinguish between pretrial detainees and convicted inmates in reviewing the challenged security practices. *Id.* at 547, n.28.

Eight years after *Bell*, this Court in *Turner v. Safley*, 482 U.S. 78 (1987), examined the constitutionality of a prison's mail and marriage regulations using a new four-factor "rational relation" test," 482 U.S. at 89, only the first factor of which asks whether there is a rational relation between the regulation and a legitimate, neutral government interest. *Id.* While *Turner* itself involved convicted prisoners and not detainees, it cited several times to *Bell*—a detainee case—in developing its standard. *See Turner*, 482 U.S. at 87-89. It also seemed to indicate that *Bell* had been a stepping stone in the development of this new standard which more directly requires courts to assess the facility's legitimate institutional concerns:

> If *Pell*, *Jones*, and *Bell* have not already resolved the question posed in *Martinez*, we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to

> legitimate penological interests. In our view, such a standard is necessary if "prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations."

Id. at 89. The *Turner* Court, stressing that the judiciary should not second guess prison officials by looking for less restrictive alternatives to the officials' chosen procedures, *id.*, stated that courts should determine a policy's reasonableness by assessing (1) whether there is a valid, rational connection between the policy and a legitimate governmental interest, (2) whether there is an alternative means for inmates to exercise the particular constitutional right, while giving the prison officials deference to their chosen means, (3) the impact that accommodating the asserted right would have on prison staff and resources, and (4) the absence of ready alternatives. *Id.* at 89-90.

Given *Bell*'s statement that the Court saw no reason to distinguish between detainees and convicted inmates in assessing the challenged security practices; and given *Turner*'s later reliance on *Bell* and its blanket statement indicating that *Bell* and the other conditions cases had seemingly generated the *Turner* test, the circuits are split regarding which test to apply to detainees' conditions of confinement claims. *Compare Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004) (applying *Bell*); *Simmons v. Sacramento County Superior Court*, 318 F.3d 1156 (9th Cir. 2003) (applying *Bell*); *Benjamin v. Fraser*, 264 F.3d 175, 187 n.10 (2nd Cir. 2001) (suggesting without deciding that *Bell*, not *Turner*, applies); and *Tesch v. County of Green Lake*, 157 F.3d 465, 475 (7th Cir. 1998) (suggesting that *Bell* applies); *with Hause v. Vaught*, 993 F.2d 1079, 1081-82 (4th Cir. 1993), *cert den.* 510 U.S. 1049 (1994) (applying *Turner*) and *Covino v. Patrissi*, 967 F.2d 73 (2nd Cir. 1992) (applying *Turner*). The Second Circuit tried to reconcile these cases by holding that *Bell* applies to jail conditions and *Turner* to prison conditions, regardless of the claimant's status as detainee or convicted inmate. *See*

Shain v. Ellison, 273 F.3d 56, 65 (2nd Cir. 2001), *cert den.* 537 U.S. 1083 (2002). One commentator has proposed that both *Turner* and *Bell* should apply together to detainees as well as prison inmates in the context of strip searches. Deborah L. MacGregor, *Stripped Of All Reason? The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees In Correctional Facilities,*" 36 Colum. J.L. & Soc. Probs. 163, 179 (2003).

The Ninth Circuit majority held that only *Bell* should apply to detainees' claims. App. 10a-11a. The dissent posited that *Turner* was the relevant inquiry. App. 24a-25a. Some circuits hold that detainees' claims must be analyzed under *Bell*. Another suggests that *Turner* can apply to the claims of both convicted inmates and detainees. One circuit holds that the status of the claimant makes no difference. Clearly, lower courts need guidance on which test to apply to pre-trial detainees' constitutional conditions of confinement claims. This Court should grant this petition and resolve the conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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January 19, 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 03-15698

JAMIE DEMERY; SAMANTHA MOORE; ARACELIA LETICIA PFEIFER; JANET LEE KING; JERRI CABANISS; ROSA VELAZQUEZ; CYNTHIA MATTHERS; RHONDA FARMER; SANDRA PUEBLA; JORDAN MARTIN; LAURA HARTNEY; ELENA M. IRVINE; YVETTE ROSE LEON; TINA MARIE SOX; LORETTA CHRISTIE; ALISON LEE ADAIR; VICTORIA ZEPEDA; NIKISHA CALLISTE; TERRY MCEVOY; TOM ODENKIRK; DEAN TOUSIGNANT; BENNY DAVID BERRYMAN; DAMON SCOGGIN; SEAN BOTKIN,

Plaintiffs-Appellees,

v.

JOE ARPAIO, Maricopa County Sheriff,
in his official capacity,
Defendant-Appellant,

and

COUNTY OF MARICOPA; John/Jane Does 1-100,
Defendants.

Argued and Submitted Dec. 3, 2003
Filed Aug. 6, 2004

Appeal from the United States District Court for the District of Arizona; Earl H. Carroll, District Judge, Presiding.
D.C. No. CV-01-00983-EHC.

Before PAEZ, BERZON, and BEA, *Circuit Judges*.

PAEZ, *Circuit Judge*.

The Fourteenth Amendment prohibits punishment of pretrial detainees. *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). Applying this principle, the district court preliminarily enjoined the use of world-wide web cameras ("webcams") in the Maricopa County Madison Street Jail. We must decide whether the district court abused its discretion in granting the plaintiffs' motion for a preliminary injunction. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I.

When Maricopa County Sheriff Joe Arpaio announced the installation of webcams in the Madison Street Jail, he proclaimed "[w]e get people booked in for murder all the way down to prostitution. . . . When those johns are arrested, they can wave to their wives on the camera." Sheriff Arpaio also explained that his policy deterred crime and opened up the jails to public scrutiny: "The public has the right to know what's going on in our jails. . . . And I believe that they act as a tool to deter crime. We hope that the only visit people make to our jail is a virtual visit." In July 2000, four webcams began streaming live images of pretrial detainees to Internet users around the world.

Sheriff Arpaio installed the webcams at the County's Madison Street Jail, a facility used exclusively to house pretrial detainees. The four webcams were placed within areas of the jail that were not open to the public except through prearranged tours. They were installed in close proximity to closed-circuit security cameras that were monitored twenty-four hours a day by Sheriffs officers.

One camera was trained on the men's holding cell. Web users could view only a portion of this holding cell, including the bunk bed area. Those detained in the men's holding cell

could therefore avoid being seen by moving to an area of the cell that was outside of the camera's view.

A second camera captured images of the pre-intake area. Pretrial detainees could be viewed being photographed, fingerprinted, and booked. A third camera was focused on the intake search area. This webcam captured live images of pretrial detainees being subjected to patdown searches.

The location of the final camera is hotly contested by the parties. The plaintiffs contend that for at least six months, one webcam captured images of the toilet and surrounding area in the women's holding cell. They also argue that the camera was only repositioned in response to this lawsuit, and that in the absence of an injunction, the Sheriff could simply move the camera back to its original location. Sheriff Arpaio, however, contends that his officers moved the camera within hours of learning that the images of the toilet area were being displayed over the internet. In any event, the camera was ultimately repositioned to capture images of the hallway outside of the holding cells.

In order to transport the images from the Madison Street Jail to web users' computers, the images had to be streamed to a website. Although the Maricopa County Sheriffs website[1] initially hosted the webcam images, the number of visitors to the site quickly overwhelmed that website's capacity. As a result, Sheriff Arpaio entered into an arrangement with a website called "Crime.com" to distribute the images to the public.

Finally, in order to view the webcam images, web users had to direct their web browsers to the Crime.com website and click on a series of links. The website informed visitors that "[i]f you fmd yourself sitting on this bunk, you probably

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[1] The uniform resource locator for the Sheriffs website is http://www.mcso.org.

have been arrested for drunk and disorderly behavior, drug possession, spousal abuse, or prostitution. Most people inside the Madison Street Jail are facing misdemeanor charges but Deputies see their fair share of murderers as well." Visitors to the Crime.com's *Jail Cam Special Ops* webpage found the following four links:

> 1. "*crime.com's Virtual Tour*: You are busted! Enter the Madison Street Jail as a detainee and see what it's like to be booked, searched, and locked-up."
>
> 2. "*Meet Sheriff Joe*: It's his jail and he's proud of it. Spend a day in the life of Sheriff Joe Arpaio on his own turf, where inmates wear pink underwear, eat green bologna and work on chain gangs."
>
> 3. "*Jail Cam*: See the first live camera in a working jail. Watch what's happening at Madison Street Jail NOW."
>
> 4. "*Shakedown*: See the first shakedown in four years at the Madison Street Jail. Watch as SWAT teams raid male and female inmate holding cells in search of smuggled drugs and crude weapons."

Visitors that chose the "Jail Cam" link were then directed to a web page where they could choose which of the four webcams they wanted to view.

Within the first few days of operation, the Crime.com website recorded six million hits, with web users visiting from as far away as Sweden, Britain, and Germany. As was the case with the Maricopa County Sheriffs website, however, the Crime.com website was unable to accommodate the number of visitors interested in viewing the webcam images. But for reasons that are unclear from the record, the Crime.com website ceased operations after this suit was filed but before the district court granted the preliminary injunction.

This suit was brought by twenty-four former Madison Street Jail detainees who challenged the Sheriffs webcam policy in Arizona state court. The defendants, Sheriff Arpaio and the County of Maricopa, removed the case to the United States District Court for the District of Arizona. After determining that there was still a live controversy, because Sheriff Arpaio was seeking a new host for the webcam images, the district court preliminarily enjoined the Sheriff from operating the webcams because the Sheriffs policy unconstitutionally punished pretrial detainees in violation of the Fourteenth Amendment.

Sheriff Arpaio filed this timely appeal. Although he concedes that there is a live controversy, he argues that the district court abused its discretion in granting preliminary injunctive relief.

II.

We first consider whether this case is moot. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). Neither party contends on appeal that this case is moot, a factor that weighs in favor of our jurisdiction because a "party moving for dismissal on mootness grounds bears a heavy burden." *Coral Constr. Co. v. King County*, 941 F.2d 910, 927-28 (9th Cir.1991). Nonetheless, we have an independent duty to consider sua sponte whether a case is moot, *Dittman v. California*, 191 F.3d 1020, 1025 (9th Cir.1999), and we consider this issue de novo. *Wade v. Kirkland*, 118 F.3d 667, 669 (9th Cir.1997).

There are two significant events that might render this dispute moot—the termination of the Crime.com website and the release of the plaintiffs from the Madison Street Jail. We conclude, however, that this controversy is not moot and

therefore we have jurisdiction to address the merits of Sheriff Arpaio's appeal.

First, we agree with the parties that the termination of the Crime.com website does not render this case moot. Sheriff Arpaio intends to and likely will find another web host willing to display the live images of the Madison Street Jail. Although a suit for injunctive relief is normally moot upon the termination of the conduct at issue, such a claim is not moot if there is a likelihood of recurrence. *See Fed. Trade Comm'n v. Affordable Media, LLC.* 179 F.3d 1228, 1238 (9th Cir.1999) (holding that injunctive relief does not become moot by defendants' voluntary cessation of allegedly wrongful behavior unless it is "absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur") (quoting *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1274 (9th Cir.1998)); *Norman-Bloodsaw*, 135 F.3d at 1274 (holding that defendants in suit for injunctive and declaratory relief must establish "either that their alleged behavior cannot be reasonably expected to recur, *or* that interim events have eradicated the effects of the alleged violation").

True, in this case the immediate cause of the defendant's cessation of the disputed activity was not in the short term voluntary, as it was not Sheriff Arpaio who discontinued the Crime.com website. *Compare, e.g., Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222, 120 S.Ct. 722, 145 L.Ed.2d 650 (2000) (describing how the Federal Government voluntarily ceased its offending conduct and holding that the case was not moot); *Norman-Bloodsaw*, 135 F.3d at 1274 (holding that the voluntary cessation by United States Department of Energy of mandatory testing for syphilis and other private, medical conditions did not moot the plaintiffs' claims). Nonetheless, as the voluntary cessation and capable-of-repetition-yet-evading-review cases, discussed infra, both illustrate, a more general principle underlies the mootness determination.

Once a defendant has engaged in conduct the plaintiff contends is unlawful and the courts have devoted resources to determining the dispute, there is Article III jurisdiction to decide the case as long as "the parties [do not] plainly lack a continuing interest. . . ." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 192, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

In light of Sheriff Arpaio's unequivocal representations, it is likely that the Sheriff will reactivate the webcams if the injunction is vacated. The Sheriff was actively searching for a new website host before the district court issued the preliminary injunction, and has stated that he plans to continue his search if the preliminary injunction is reversed. Because the Madison Street Jail images increased the popularity of the crime.com website, and because web technology advances rather than retreats, there is no basis for supposing that the Sheriff will not succeed in his search for a new host. It is also possible that the Sheriff could upgrade his own website to show the images. As the defendant intends to resume his behavior if he can and there has been no showing that recurrence is not technologically and otherwise feasible, it is reasonably likely that he will resume the contested web postings. As there is a sufficient likelihood that the Sheriffs use of webcams will recur, the temporary cessation caused by the demise of Crime.com does not render this case moot.

Second, the release of the plaintiffs from the Madison Street Jail and consequent inability to post their images on the web any longer does not render this case moot, because this controversy falls squarely within the capable-of-repetition-yet-evading-review branch of the mootness doctrine. This branch applies when (1) the duration of the challenged action is too short to be litigated prior to cessation, and (2) there is a "reasonable expectation" that the same parties will be subjected to the same offending conduct. *Spencer v. Kemna*, 523 U.S. 1, 17-18, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998); *Mitchell*

v. Dunnik, 75 F.3d 517, 528 (9th Cir.1996). Because the Madison Street Jail is a pretrial detention center, "the length of detention in the county jail is short enough that any individual detainee's claim would probably become moot before trial." *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1117-18 (9th Cir.2003). As the Supreme Court has explained, "[p]retrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted." *Gerstein v. Pugh*, 420 U.S. 103, 111 n. 11, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). In these circumstances, the plaintiffs readily satisfy the first prong of the capable-of-repetition-yet-evading-review branch of the mootness doctrine.

To satisfy the second prong, the plaintiffs "must show either a 'demonstrated probability' or a 'reasonable expectation' that [they] would be transferred back to [the Madison Street Jail] or released and reincarcerated there." *Oliver v. Scott*, 276 F.3d 736, 741 (5th Cir.2002) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982)); *see also Mitchell*, 75 F.3d at 528. Our analysis of this second prong is guided by our decision in *Mitchell*. In *Mitchell*, the district court enjoined the challenged pretrial detention center policy even though the plaintiff had been convicted and transferred to state prison. Because the plaintiff was pursuing post-conviction relief that, if he were successful, would entitle him to a new trial, the district court held that the plaintiff had a reasonable expectation that he would return to the pretrial detention center. We reversed, noting that although these "circumstances arguably satisfied the exception's second prong," the plaintiff no longer had a reasonable expectation that he would be reincarcerated at the pretrial detention facility because the plaintiffs petitions for post-conviction relief had since been denied. 75 F.3d at 528.

In contrast, the record here contains compelling evidence that the plaintiffs likely will be reincarcerated at the Madison Street Jail. For example, plaintiff Benny Berryman was detained at the Madison Street Jail on twenty different occasions between February 1997 and June 2002. Eleven other named plaintiffs also have been detained at the Madison Street Jail on more than one occasion. Thus, this controversy also satisfies the capable-of-repetition prong. Accordingly, the case is not moot and we have jurisdiction to decide the merits of Sheriff Arpaio's challenge to the district court's preliminary injunction order.

III.

In considering Sheriff Arpaio's arguments, we begin with the proposition that our review of a district court order granting a preliminary injunction is "subject to limited review." *United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 839 (9th Cir.2002). We can reverse the district court only if it abused its discretion. *Gorbach v. Reno*, 219 F.3d 1087, 1091(9th Cir.2000) (en banc). The district court necessarily abuses its discretion if it relies on an erroneous legal standard or on clearly erroneous factual findings. *Brookfield Communications, Inc. v. West Coast Entm't Corp.*. 174 F.3d 1036, 1046 (9th Cir.1999). Accordingly, we review de novo any underlying issues of law. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir.1996). However, "[w]e typically will not reach the merits of a case when reviewing a preliminary injunction. By this we mean we will not second guess whether the court correctly applied the law to the facts of the case, which may be largely undeveloped at the early stages of litigation." *Rucker v. Davis*, 237 F.3d 1113, 1118 (9th Cir.2001) (en banc) (internal citations omitted), *rev'd on other grounds by Dept. of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 122 S.Ct. 1230, 152 L.Ed.2d 258 (2002).

Sheriff Arpaio's challenges to the district court's order boil down to two arguments: the district court misidentified the

applicable law and the district court misapplied the law to the facts of this case. We consider these contentions separately.

A.

In evaluating the plaintiffs' motion for injunctive relief, the district court applied the correct legal standard. As the district court recognized, the Supreme Court held in *Bell v. Wolfish* that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." 441 U.S. at 535, 99 S.Ct. 1861. More specifically, the district court correctly identified and applied *Bell's* test for identifying unconstitutional punishment at the pretrial stage of a criminal proceeding. That test asks whether there was an express intent to punish, or "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Id.* at 538, 99 S.Ct. 1861 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168- 69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)). Sheriff Arpaio contends that this was an incorrect legal standard because the plaintiffs never raised a *Bell* challenge to the webcams. The plaintiffs' district court filings reveal otherwise. For example, the plaintiffs' fifth and eighth causes of action, as well as their motion for a preliminary injunction, alleged that the webcams violated their Fourteenth Amendment Substantive Due Process rights. In footnote 4 of their complaint, the plaintiffs specifically claimed that the webcams undermined their Fourteenth Amendment Substantive Due Process right to be free of punishment. And in their response to the defendants' motion to dismiss, which was heard in conjunction with the plaintiffs' motion for a preliminary injunction, the plaintiffs argued that "the Internet displays are punishment, the very thing that the state and federal constitutions prohibit governments from imposing upon unconvicted prisoners."

Alternatively, Sheriff Arpaio argues that the four-part "reasonable relation" test of *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987),[2] replaced the *Bell* punishment test. He concedes, however, that we have continued to apply Bell even after the Supreme Court's decision in *Turner*. *See Valdez v. Rosenbaum*, 302 F.3d 1039,1045-47 (9th Cir.2002), *cert. denied*, 538 U.S. 1047, 123 S.Ct. 2110, 155 L.Ed.2d 1087 (2003). We are, of course, powerless to overrule the decision of a prior Ninth Circuit panel. *See Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cit. 1993). Moreover, *Turner* is inapposite for two reasons. First, *Turner* dealt with convicted prisoners, not pretrial detainees. Second, *Turner* involved an Eighth Amendment cruel and unusual punishment challenge, not a claim brought under the Substantive Due Process Clause of the Fourteenth Amendment.[3] Both distinctions are critical because the Fourteenth Amendment prohibits all punishment of pretrial detainees, while the Eighth Amendment only prevents the imposition of cruel and unusual punishment on convicted prisoners. *See Bell*, 441 U.S. at 535 n. 16, 99 S.Ct. 1861.

Finally, Sheriff Arpaio suggests that the district court strictly scrutinized the webcam policy, even though *Bell* only permits courts to examine whether the policy is an excessive response to a legitimate purpose. The district court deter-

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[2] *Turner's* four-factor test for determining whether a prison regulation is reasonable asks: (1) whether the objective is "legitimate and neutral" and logically connected to the challenged regulation; (2) whether the prisoners have alternative means of exercising the right that they allege is infringed; (3) whether accommodation would have a "significant ripple effect" on guards, prisoners, and prison resources; and (4) whether there are a lack of alternative prison policies that could satisfy the objective. 482 U.S. at 89-91., 107 S.Ct. 2254.

[3] We note that even under the *Turner* test, the Supreme Court struck down an almost complete ban on prisoner marriages because it was "an exaggerated response" to the objectives put forth by prison administrators. 482 U.S. at 97-98, 107 S.Ct. 2254.

mined that improving jail security was not a legitimate alternative purpose for the webcams because they were placed nearby closed-circuit security cameras. Thus, it concluded that the webcams "amount to an exaggerated response to an already-fulfilled security need." Sheriff Arpaio asserts that this amounts to strict scrutiny, but we disagree. In *Bell*, the Court held that the means employed cannot be "excessive in relation to the alternative purpose." 441 U.S. at 538.99 S.Ct. 1861. Although the district court used the term "exaggerated" rather than "excessive," this hardly proves that it was employing strict scrutiny. And in light of the fact that closed-circuit security cameras already were stationed nearby and the webcam images could be viewed by millions of people worldwide, the webcams were plainly an excessive response to Sheriff Arpaio's interest in maintaining jail security. In sum, the Sheriff has failed to demonstrate that the district court applied an erroneous legal standard.

B.

Sheriff Arpaio also challenges the district court's application of Bell to the facts of this case. This line of argument, however, ignores our standard of review for a preliminary injunction. As we have explained before, "[a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir.2001) (quoting *Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir.1995)) (internal quotation marks omitted).

Additionally, we agree with the district court's application of the law to the facts. As we noted earlier, *Bell* held that, "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." 441 U.S. at 535, 99 S.Ct. 1861. For a particular governmental action to constitute punishment, (1) that action must cause the detainee to suffer some harm or

"disability," and (2) the purpose of the governmental action must be to punish the detainee. *Bell*, 441 U.S. at 538, 99 S.Ct. 1861("A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."). Both requirements are met here.

Plaintiffs were certainly harmed by Sheriff Arpaio's actions. Having every moment of one's daily activities exposed to general and world-wide scrutiny would make anyone uncomfortable. Exposure to millions of complete strangers, not to mention friends, loved ones, co-workers and employers, as one is booked, fingerprinted, and generally processed as an arrestee, and as one sits, stands, or lies in a holding cell, constitutes a level of humiliation that almost anyone would regard as profoundly undesirable and strive to avoid.

Nothing in *Bell* requires that, to be punishment, a harm must be independently cognizable as a separate constitutional violation (e.g., a deprivation of First Amendment rights, or a violation of a constitutional right to privacy). Rather, to constitute punishment, the harm or disability caused by the government's action must either significantly exceed, or be independent of, the inherent discomforts of confinement. *Bell*, 441 U.S. at 537, 99 S.Ct. 1861("Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.'").

In *Bell*, the Supreme Court determined that the practice of double-bunking pretrial detainees did not impose enough of a hardship to rise to the level of a constitutional violation. 441 U.S. at 543, 99 S.Ct. 1861. In that case, however, the Court's premise was that any pretrial detention inherently involved some discomfort; a detainee's sleeping conditions even when

not double-bunked were far from ideal, and the additional discomfort of having to share the already close corners with another detainee was not sufficiently great to constitute punishment.

In the case at hand, however, the additional impact on pretrial detainees of webcam transmission is greater by several orders of magnitude than the intrusion inherent in incarceration. Being detained in a county jail necessarily involves being observed by the staff of the jail and the other detainees. The webcams increase exponentially the number of people observing detainees, and also alter drastically the classes of people who can watch the detainees. The discomfort to a detainee of having her children, for example, watch her while she is being detained is incalculably greater than having jail guards watch the same procedure.

Having determined that Sheriff Arpaio's practice of streaming images of detainees on the web constitutes a harm, we now turn to whether this harm is imposed "for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Bell*, 441 U.S. at 538, 99 S.Ct. 1861. The webcams did not improve the security of the pretrial detention center when closed-circuit video cameras were already present. Indeed, because the webcams were placed so close to the closed-circuit cameras, they did not even serve to increase the area of the jail that was subject to video surveillance. And because the Sheriffs deputies were presumably already monitoring the images captured by the closed-circuit video cameras, there was no added benefit to publishing the images on the internet. An unruly detainee, willing to ignore the watchful eye of nearby prison guards, would not be deterred from engaging in disruptive behavior by the prospect of an unknown private citizen halfway around the world viewing his grainy image over the internet.

Nor do we find any merit to the two alternative purposes put forth by Sheriff Arpaio. First, he contends that the web-

cams deter crime because the public, having viewed the process of fingerprinting, pat-down searches, and pretrial detention will decide that being arrested and confined in a pretrial detention center is a fate to be avoided. The Supreme Court, however, stated in *Bell* that "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives" that can justify adverse conditions of detention for pretrial detainees, 441 U.S. at 539 n. 20, 99 S.Ct. 1861, and has classified deterrence as one of "the traditional aims of punishment." *Id.* at 538, 99 S.Ct. 1861 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)). We also have recognized that deterrence does not qualify as a nonpunitive goal with regard to pretrial detainees. *White v. Roper*, 901 F.2d 1501, 1504-05 (9th Cir.1990). To be sure, as a general matter, deterrence of crime through a variety of means is a legitimate governmental objective.[4] But, as the Supreme Court and this court have

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[4] We disagree with the dissent's claim that installing webcams in pretrial detention facilities serves the same government interest as a perp walk: deterring members of the public from committing similar offenses.

A perp walk "is a widespread police practice in New York City in which the suspected perpetrator of a crime, after being arrested, is 'walked' in front of the press so that he can be photographed or filmed." *Lauro v. Charles*, 219 F.3d 202, 203 (2d Cir.2000). Our sister circuit held that legitimate perp walks (i.e.—ones that are not staged purely for the television cameras) do not violate the Fourth Amendment because they serve the government's interest in informing the public about its efforts to enforce the law that the defendant was charged with violating. *Caldarola v. County of Westchester*, 343 F.3d 570, 576 (2d Cir.2003). No similar interest is served by placing webcams in holding cells because viewers have no idea why the arrestee was booked. As the Crime.com website explained to viewers, arrestees could have been arrested for crimes ranging from disorderly behavior to spousal abuse, from drug possession to murder.

The Sheriffs policy, while less effective than a perp walk, is also far more intrusive, for it is not just a one-time filming of an arrestee in a public place, but a 24-hour-a-day entertainment program viewable by

recognized, where an individual is incarcerated before trial but has not been convicted of any crime, imposing adverse conditions during his detention as a means of deterring crimes is not permissible. Such exploitation of pretrial detainees is not "appropriate to assure the detainees' presence at trial [or] to maintain the security and order of the detention facility and otherwise manage the detention facility." Halvorsen v. Baird, 146 F.3d 680, 689 (9th Cir.1998). Thus, Sheriff Arpaio cannot point to deterrence, general or specific, as a legitimate government interest that justifies the installation of webcams in the Madison Street Jail.

Second, Sheriff Arpaio argues that the cameras are justified by the County's interest in having its pretrial detention centers open to public scrutiny. We have given prison officials wide latitude in administering pretrial detention facilities, in guaranteeing detainees' attendance at trial, and in promoting prison safety. *Id.* But we fail to see how turning pretrial detainees into the unwilling objects of the latest reality show serves any of these legitimate goals.[5] As the

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internet users around the world. The Sheriff does not have "free reign to use videotape or other potentially overly intrusive means to achieve the government purposes enumerated above." *Id.* at 577.

[5] We find the dissent's assertion that shaming has "nowhere been cited as a form of penological punishment" both remarkable and deeply troubling. As the Supreme Court said in describing colonial forms of punishment, "[e]ven punishments that lacked the corporal component, such as public shaming, humiliation, and banishment involved more than the dissemination of information." *Smith v. Doe I*, 538 U.S. 84, 98, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (emphasis added); *see also* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L.Rev. 591, 631-32 (1996). Placing arrestees on public display in the stocks is a part of our distant past and shocks the modern conscience. But under the dissent's approach of treating shaming as a legitimate government objective in the administration of pretrial detention centers, it is difficult to see how such a draconian policy would be impermissible. Although a regulation that has the incidental effect of shaming may not be a form of punishment, *see Smith*. 538 U.S. at 98-99, 123 S.Ct. 1140, we have no

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Supreme Court has recognized, "[i]nmates . . . are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others." *Houchins v. KOED, Inc.*, 438 U.S. 1, 5 n. 2, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) (plurality opinion).[6] Also, the Supreme Court has held that the government's otherwise legitimate interest in "informing the general public about the administration of criminal justice" does not justify the presence of reporters during the execution of search warrants at a suspect's home. *Wilson v. Layne*, 526 U.S. 603, 612, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). Such press exposure impairs citizens' Fourth Amendment right to be free of unreasonable intrusions into their homes, held the Court, even when a search is warranted. *Id.* Here, similarly, the otherwise valid governmental interest in assuring accountability and public scrutiny cannot justify broad public exposure of pretrial detainees' intimate circumstances, as none of the purposes justifying pretrial detention are served thereby. The Sheriffs policy is all the more troubling because displaying images of the County's pretrial detainees to internet users from around the world is not rationally connected to goals associated with educating the citizenry of Maricopa County.

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doubt that when the government acts with the purpose of shaming an unconvicted detainee, it most definitely is committing an act of punishment in violation of the Fourteenth Amendment's Due Process Clause.

[6] We recognize that, in a case decided before Bell, the Supreme Court has held that the disclosure of an arrest record does not violate a constitutionally protected right of privacy. *Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Here, however, the district court order was not premised on a privacy right, but on a pretrial detainee's Fourteenth Amendment Substantive Due Process right to be free from punishment. In Paul, the release of arrest records was not a condition of pretrial detention. More importantly, there is a stark difference between releasing an arrest record and thereby publicizing only "the fact of [a detainee's] arrest," *id.* at 713, 96 S.Ct. 1155, and streaming live images of a pretrial detainee's every movement across the broad spectrum of the internet.

We also reject Sheriff Arpaio's contention that the injunction violates his First Amendment rights. The webcam transmissions were not Sheriff Arpaio's personal communications. The webcams were governmental property, installed on government-owned premises operated for a governmental purpose; the transmissions were originally over the Sheriff department's official website. Absent his official position, Sheriff Arpaio could not have obtained or transmitted the images. The speech was therefore that of a governmental executive officer acting in his official, managerial capacity, and as such is governmental speech, not the personal speech of a government employee. Compare *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (holding the discharge of a public employee for her comment to a co-worker on a matter of public concern to be a violation of employee's First Amendment rights); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979) ("Neither the [First] Amendment itself nor our decisions indicate that [freedom of speech] is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."). The district court correctly held that "the Bill of Rights protect the individual from the government, not the other way around."

Sheriff Arpaio cites *Downs v. Los Angeles Unified Sch. Dist.*. 228 F.3d 1003, 1013 (9th Cir.2000), for the notion that the government has First Amendment rights. But *Downs* simply held that when the government is the speaker, it does not violate the First Amendment rights of individuals by expressing a particular viewpoint. *Id.* Nowhere did *Downs* suggest that the government has a cognizable First Amendment right or interest.

In short, the webcams are not reasonably related to a non punitive purpose. Therefore, we agree with the district court's determination that plaintiffs will likely prevail on their claim

that placing webcams in a pretrial detention center violates the Fourteenth Amendment substantive due process rights of pretrial detainees by subjecting them to punishment. Accordingly, we hold that the district court did not abuse its discretion in granting the preliminary injunction.

IV.

Sheriff Arpaio has failed to demonstrate that the district court abused its discretion in granting the plaintiffs' motion for a preliminary injunction. Accordingly, we affirm the district court's order.

AFFIRMED.

BEA, *Circuit Judge*, dissenting.

Perhaps in an effort to express their repugnance for the Madison Street Jail webcast policy, the majority opinion substitutes conjecture for analysis of the mootness issue. On the issue whether the webcasts constitute constitutionally impermissible pre-conviction punishment, the majority opinion substitutes the personal tastes of the Court of Appeals judges for the analysis the Supreme Court directs us to use as to what constitutes such punishment. Last, the majority opinion simply refuses to consider any rational relation between the webcasts and the legally permissible governmental purposes stated by the Sheriff. The result is the imposition of the majority's will in the place of the judgment of the lawfully elected representative of Maricopa County voters. Because of these inadequacies, I respectfully dissent.

I.

Mootness

Notwithstanding the parties' failure to brief the issue, the majority opinion correctly acknowledges our responsibility to address the mootness question: whether this action presents a live case or controversy. Then, somewhat perfunctorily, they conclude that this case falls within the "capable-of-repetition-yet-evading-review" exception to mootness. *See Spencer v. Kemna*, 523 U.S. 1, 17-18, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998). To state a cognizable injury under *Article III of the Constitution*, the Plaintiffs must show a sufficient likelihood that they—not others—will be subjected to the webcasts in the future, that is, that they will in all likelihood be arrested and detained at the Madison Street Jail in the future. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (district court granted preliminary injunction to stop use of police chokeholds; Court of Appeals affirmed; Supreme Court reversed, finding Plaintiffs lacked

standing to seek injunctive relief absent a showing of realistic threat to Plaintiffs—not others—of future injury).

The majority opinion determines that because some of the Plaintiffs have experienced detention by Appellant Sheriff on earlier occasions, this constitutes "compelling evidence that the Plaintiffs likely will be reincarcerated." I do not take such a dim view of either the ineffectiveness of our criminal justice system or of human nature.[1] Nor do I believe that any self-ascribed propensity of Plaintiffs towards future arrest and detention—whether through their own malfeasance or simple bad luck—is legally sufficient to clothe Plaintiffs with the required standing.

The majority opinion correctly cites *Spencer v. Kemna* for the applicable standards to the standing requirement, but then proceed to ignore that case's holding that risk of future apprehension and conviction is insufficient to establish a personal stake in a habeas challenge to parole revocation procedures:

> [Standing] was contingent upon respondents' violating the law, getting caught, and being convicted. "Respondents themselves are able--and indeed required by law—to prevent such a possibility from occurring." . . . "[W]e are . . . unable to conclude that the case-or-controversy requirement is satisfied by general assertions or inferences that in the course of their activities respondents will be prosecuted for violating valid criminal laws. We assume that respondents will conduct their activities within the law and so avoid prosecution and conviction."

Spencer v. Kemna, 523 U.S. 1, 15, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (citations omitted); *see also O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)

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[1] After all, we go to great lengths to prevent proof of prior bad acts as evidence of criminal character likely to produce the commission of a new offense. *See Fed.R.Evid. 404(b).*

(district court dismissed class action challenging bond, sentencing, and jury fee practices in criminal cases; Court of Appeals reversed; Supreme Court reversed, fmding that Plaintiffs lacked standing because they had not alleged that they had been or would be improperly charged with violating the criminal law). Because Plaintiffs here cannot show that, but for their future arrest and incarceration, they again would be subjected to being viewed on the Sheriffs webcasts, they have not shown a legally cognizable case or controversy. Only by speculating, without proof, that at some unspecified time in the future they (not others) will again be arrested and taken to the Madison Street Jail, and again be viewed on the Sheriffs webcasts, can Plaintiffs state a cognizable case or controversy. Such speculation is not enough to confer standing on Plaintiffs under the Supreme Court cases cited above.[2]

A finding of lack of standing would seem mandated by a case cited by the majority, *Mitchell v. Dupnik* 75 F.3d 517 (9th Cir.1996). Once Mitchell was removed from the detention center and his petitions for post-conviction relief were denied, Mitchell lost standing to seek injunctive relief from detention center practices because there was no reasonable expectation that he would be returned to the detention center. *Mitchell*, 75 F.3d at 528. The majority opinion maintains the

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[2] But, some will complain, if these Plaintiffs cannot bring the action, the legality of the Sheriffs webcasts may never be adjudicated. Just so. Such a complaint is based on the unarticulated premise that every government action must be validated or rejected by a court. Nothing could be more in contrast to the constitutional requirements of standing. Only "cases or controversies" which involve recognized legal rights can be the subject of a federal court action. "We can decide only cases or controversies. A moot case is not a 'case' within the meaning of *Article III*." *Eisler v. United States*, 338 U.S. 189, 194, 69 S.Ct. 1453, 93 L.Ed. 1897 (1949). As to other claimed issues, remedies may have to be sought at the ballot box, the market place or by other means provided by society, but not lawsuits.

plaintiffs here have standing because, in view of their prior arrest records, they are likely to be rearrested. Mitchell arguably had a greater claim that he was likely to be detained in the future—he was a convict, not just a detainee. Yet Mitchell did not have standing. *Id.*

I would reverse the district court's order granting a preliminary injunction on the ground that Plaintiffs have not presented a justiciable case or controversy in this action.

II.

Claimed "Punishment"

The majority's conclusion that the webcasts inflict punishment prohibited by the Constitution is likewise unconvincing. As public servants, county sheriffs are charged with several important duties under Arizona law. These duties include preserving the peace, "arrest[ing] and tak[ing] before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense," "prevent[ing] and suppress[ing] all affrays, breaches of the peace, riots and insurrections . . . ", and "[taking] charge of and keep[ing] the county jail . . . and the prisoners therein." *Ariz. Rev. Stat. § 11-441(A).*[3]

Given the importance and difficulty of fulfilling the responsibility of operating penological installations, courts have taken an understandably cautious approach to second-guessing the decisions of prison administrators:

> [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legisla-

[3] Sheriff Joe Arpaio was elected by the people of Maricopa County in 1992, and reelected in 1996 and 2000.

> tive and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

Turner v. Safley, 482 U.S. 78, 84-85, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (in class action challenge to prison regulations regarding correspondence and inmate marriage, district court granted preliminary injunction in favor of inmates; Eighth Circuit affirmed, finding .egulations violated First Amendment; Supreme Court reversed ruling on correspondence regulation, but affirmed order enjoining inmate marriage prohibition). This rationale is no less applicable in the context of jails and detention facilities. *See Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir.1999) (district court granted summary judgment in favor of county on challenge by prisoners and detainees to jail's rule against sexually explicit periodicals; Court of Appeals affirmed, fmding regulation reasonably related to legitimate penological interests).

The district court's injunction was predicated on the belief that webcam broadcasts constitute impermissible pre-conviction "punishment" in violation of Fourteenth Amendment substantive due process. Although, "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt," *Bell v. Wolfish*. 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment,' "*id.* at 539, 99 S.Ct. 1861; *see also Valdez v. Rosenbaum*, 302 F.3d 1039, 1045 (9th Cir.2002) (district court granted summary judgment in favor of jail officials in detainee's challenge to restrictions on telephone access; Court of Appeals affirmed). The relevant inquiry is whether jail policies are reasonably related to legitimate

penological interests, as opposed to "an inflexible strict scrutiny analysis [that] would seriously hamper [the Sheriffs] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Mauro*, 188 F.3d at 1058.

The majority opinion gives needlessly short shrift to the governmental objectives proffered by Sheriff Arpaio. Although the majority opinion briefly acknowledges that the Sheriffs legitimate governmental purpose in the webcasts is to deter the non jailed public from conduct which might obligate them to visit the jail other than by virtual means, the majority opinion leaves unexamined whether the webcasts are rationally related to the achievement of this goal. The majority opinion jumps to the question of whether the webcasts deter the already jailed, but does not say a word about whether the webcasts were intended to deter the general public from illegal conduct.

Let us then apply the rational relation test to each of the Sheriffs proposed purposes:

Is it rational to believe that broadcasting pictures of detention installations will deter viewers from conduct that may land them there? Any traffic school attendee who is required to view ghastly photographs of crashes that result from speeding can attest that the consequences of actions are displayed to deter certain behavior. The rational relationship between prison views and deterrence of criminal behavior is similarly clear.

Do webcasts provide transparency to governmental operation of the facility? Clearly so. Of course, there are other means by which to provide such transparency. The Sheriff could give civic-minded groups tours of the jail to assure them of proper conditions and well-spent taxes. But whether the choice to expose detainees by webcast to millions or by tours to dozens is surely a matter of degree, left to the

discretion of an elected official, restrained only by notions of whether choice of the larger number of viewers makes the measure "excessive" under Bell.

Do webcasts deter the filing of frivolous lawsuits against the county and county officials? Given that security cameras are already in place to videotape what actually happens in the jail, this purpose may suffer from the same redundancy as does the jail security rationale. On the other hand, the webcasts may reach more potentially frivolous litigants than would the knowledge that the jails had security cameras in place.

It bears repeating that this is a case where we may review governmental action only to determine whether that action bears a rational basis to legitimate governmental interests. *See Mauro v. Arpaio*. 188 F.3d 1054, 1060 (9th Cir. 1999) (en banc). This is not a case where the Sheriffs actions are subject to a "strict scrutiny" test.

By the proper "rational relation" test, the webcasts seem clearly allowable to attain public deterrence and transparency purposes. *Bell* stands for the proposition that if there is a "reasonable relation" between the measure and a legitimate governmental purpose, the measure will not be found to be punishment, "without more." *Bell*, 441 U.S. at 539, 99 S.Ct. 1861. What is this "more" that may nonetheless invalidate a measure, even after a finding it is "reasonably related" to a legitimate governmental purpose? *Bell* gives us a non-exhaustive list of factors, which includes:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether

> it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Bell, 441 U.S. at 537-38, 99 S.Ct. 1861(citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)). The *Bell* Court noted that the objective of deterrence of the person punished is only one of a series of "useful guideposts" in determining whether a restriction or condition is "punishment," while acknowledging the possible existence of a constitutionally-valid "alternative purpose," later recognized in *Turner*.[4] *Bell*, 441 U.S. at 538, 99 S.Ct. 1861. Reviewing these guideposts in the context of this case, the conclusion that the webcasts purport to visit constitutionally-prohibited punishment on detainees is untenable.

Let us examine each of the *Bell* factors. An affirmative answer indicates a factor in favor of finding the measure to be prohibited punishment; a negative answer, indicates the measure is not punishment: a factor favoring permitting the measure.

1. Do the webcasts involve an affirmative disability or restraint? No. Inmates are not restricted to zones perused by the webcams. Neither are they detained in jail a moment longer because of the webcasts.

2. Are the webcasts historically regarded as punishment? No. They are too new to have a historical characterization.

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[4] There is nothing in *Turner* which limits this principle solely to convicted prisoners, as the majority opinion claims. While it is accurate to say that *Turner* involved those already convicted of crimes, they, like Plaintiffs, retained certain constitutional rights such as not to have additional punishment visited on them without a predicate finding of guilt for different and additional transgressions. Were there a valid "alternative purpose" to the challenged measure, convicts as well as detainees would fail in their constitutional challenge.

3. Are the webcasts activated only on a finding of *scienter*? No. The inmates are detained or arrested on misdemeanors, such as minor traffic offenses and drunkenness, which do not require *scienter*.

4. Do the webcasts promote the traditional aims of punishment—retribution and deterrence? Yes, to the extent that emotional discomfort—shame—is visited on the detainees, that can be retribution and deterrence of the detainees. Indeed, the Sheriff admits he hopes the experience will deter recidivism. But No as to deterrence of the viewing public. There can be no punishment of the viewing public because that public is not shown on the webcasts, and because if offended the public viewer need only single-click to close the screen. Thus, the retribution and deterrence factor presents a mixed response.[5]

5. Is the behavior to which it applies already a crime? No. The behavior viewed by the webcams is pretrial detention that, by itself, is not a crime.

6. Does it appear excessive in relation to the alternative purpose of public deterrence? No, when compared to the constitutionally permissible publicity routinely given to "perp walks" on local and nationally broadcast television.

The balance of *Bell* factors weighs heavily—almost exclusively—against the existence of the additional characteristics required by *Bell* to disqualify a measure reasonably related to the achievement of a legitimate governmental objective as punishment. Nonetheless, the majority opinion accepts a contrary assessment wholesale, seemingly as an article of faith. It is particularly telling that in the portion of the majority opinion concluding the webcasts constitute punishment,

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[5] This constitutes a fulfillment of *Bell's* prediction that inquiry into what factors make up punishment "may often point in differing directions." *Bell*. 441 U.S. at 538. 99 S.Ct. 1861.

the majority cite no authority, case or statute, for the proposition that webcasts are punishment. That majority opinion's aversion to the webcasts is not shared by the voters of Maricopa County, who re-elected Appellant Arpaio shortly after the webcasts commenced.

The majority opinion omits the *Bell* analysis[6] and equates webcasts with harm without establishing that such harm rises to the level of constitutionally-prohibited punishment. The webcasts publicize the arrest and, to that extent, may result in shame being inflicted on detainees. While shaming has long been a method of societal ostracism, it has nowhere been cited as a form of penological punishment, much less is there any authority for the claim that shaming causes violations of individual rights protected by the U.S. Constitution.[7]

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[6] Nowhere does the majority opinion ask the six questions above as to the six *Bell* factors regarding whether a measure taken constitutes punishment.

[7] The majority opinion quotes disapproving references by the Supreme Court to colonial shaming punishments, *see Smith v. Doe*. 538 U.S. 84, 123 S.Ct. 1140, 155 I,.Ed.2d 1 64 (2002), and mischaracterizes this dissent as "treating shaming as a legitimate government objective." The majority opinion conveniently omits additional reasoning contained in the same opinion:

> [P]ublic shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community. . . . Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the contrary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. *Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism.* In contrast to the colonial shaming punishments, however, the State does not make the public

The majority opinion attempts to dispose of the Supreme Court's holding in *Paul v. Davis* in a footnote. *Paul*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), is more pertinent than the majority opinion would allow. That case concerned the stigmatizing of persons arrested for, but not convicted of, shoplifting, by police officers distributing a flyer that listed the Plaintiffs among active shoplifters. The Supreme Court declined to attach much significance to the claims of dignitary injury which are directly analogous to the claims asserted by the Plaintiffs here. The Court held that the government does not, simply by the act of defaming a person, deprive him of liberty or property rights protected by notions of procedural due process, absent some adverse impact on some other legally cognizable interest. *Id.* at 708-10, 96 S.Ct. 1155. Note that in *Paul*, Plaintiffs claimed dignitary injury because they were defamed, falsely portrayed as shoplifters by the police flyers. Here, Appellees can hardly claim the webcasts defame them. The more clearly they appear on camera, so does the truth: they have been detained for alleged lawbreaking.

The so-called dignitary harms asserted by the Plaintiffs in this case are also similar to the Fourth Amendment[8] objec-

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> ity and the resulting stigma an integral part of the objective of the regulatory scheme.

Smith v. Doe. 538 U.S. at 97, 123 S.Ct. 1140 (emphasis added). Thus, this case appears to suggest that while shaming qua shaming is impermissible, regulations or conditions not characterized by face-to-face confrontation or banishment are not *per se* penological punishment.

[8] The district court properly rejected Appellees' claims of violations of privacy rights for the best of reasons: The Supreme Court has held that prisoners in custody do not have a reasonable expectation of privacy in their cells arising from the Fourth Amendment. *See Hudson v. Palmer*, 468 U.S. 517, 526, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (district court granted summary judgment in favor of prison guard on inmates claims of violation of privacy, destruction of personal property and denial of due

tions of arrestees subjected to the now ubiquitous-on-TV "perp walk"—the conspicuous exhibition of coiffed, suited, corporate criminal suspects, usually handcuffed, as they are brought to the courthouse or police station before charging, much less conviction. Although a staged "perp walk" has been termed an unreasonable seizure where it does not advance legitimate law enforcement purposes, it is not the case "that all, or even most, perp walks are violations of the Fourth Amendment." *Lauro v. Charles*. 219 F.3d 202, 213(2d Cir.2000) (reversed in part district court's partial summary judgment which found staged perp walk had violated Fourth Amendment rights of Plaintiff and denying qualified immunity to defendants; appellate court found Fourth Amendment violation, but also found defendant police officers were entitled to qualified immunity).

Perp walks and their attendant shaming do not constitute constitutionally impermissible pre-conviction punishment for the same reasons webcasts do not. Whatever the consequence of an arrestee's being "displayed to the world, against his will, in handcuffs, and in a posture connoting guilt," *Id.* at 212 n. 7, perp walks promote many of the same governmental purposes put forward here by Sheriff Arpaio.

> Yet, perp walks also serve the more serious purpose of educating the public about law enforcement efforts. The image of the accused being led away to contend with the justice system powerfully communicates government efforts to thwart the criminal element, and it may deter others from attempting similar crimes.
>
> * * *
>
> Divulging the arrests also enhances the transparency of the criminal justice system, and it may deter others from attempting similar crimes. Furthermore, allowing the

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process; Fourth Circuit reversed in part on privacy claims; Supreme Court reversed, fmding inmates had no reasonable expectation of privacy).

> public to view images of an arrestee informs and enables members of the public who may come forward with additional information relevant to the law enforcement investigation . . .

Caldarola v. County of Westchester. 343 F.3d 570, 572-73 & 576 n. 3 (2d Cir.2003) (citations and quotations omitted, emphasis added) (affirming district court's summary judgment in favor of defendants, holding arrestee's privacy interests outweighed by legitimate governmental objectives of perp walk); *see also Rosenberg v. Martin*, 478 F.2d 520, 525-26 (2d Cir.1973) (reversing jury award of damages in 42 U.S.C. § 1983 claim, finding no violation of right to privacy where defendant was taken out of the police car a half block away from the station and paraded before television cameras, while the arresting officer announced "He is the killer, and he is going to burn.").[9]

Likewise, sex offender registration laws which involve the "dissemination of accurate information about a criminal record, most of which is already public," have survived Ex Post Facto challenges because, although such registration laws may shame, their application does not effect penal punishment. *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (20021 (rejecting ex post facto challenge to Alaska sex offender registration statute). The argument that any govern

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[9] The majority opinion attempts to distinguish "perp walk" cases which have passed constitutional muster partially on the grounds that the interest involved in those cases derived from the Fourth Amendment, rather than from the Fourteenth Amendment as claimed here. These cases do not deter the majority opinion from citing Fourth Amendment jurisprudence (see *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)) to argue the webcasts were "excessive." Rather than such selective applications, I would suggest that notions of what is permissible under the Fourth Amendment should inform what is permissible under the Fourteenth Amendment across the board.

mental program which has the goal of public deterrence must visit impermissible punishment is not persuasive.

> [It] proves too much. Any number of governmental programs might deter crime without imposing punishment. To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation.

Smith v. Doe, 538 U.S. at 102, 123 S.Ct. 1140; *see also Hatton v. Bonner*, 346 F.3d 938, 948 (9th Cir.2003) (applying *Smith* to California sex offender registration statute).

Where the sole effect of a measure is deterrence of the preconviction detainee, the measure may violate the fourth factor listed in *Bell.*[10] Here, as in the perp walk, the webcasfs effect is purposely beyond deterrence of the detainees; its purposeful effect is also to deter unlawful conduct by members of the public who have as yet not been--and one hopes never will be—detained.[11]

Persons arrested cannot choose to whom the fact of their arrest can be publicized, whether it is through a perp walk

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[10] A point on which I agree with the majority, perhaps I did not make it clearly enough. The point is that although shaming may cause the pretrial detainee emotional harm, which would be impermissible if the only purpose were to deter his future criminal conduct. But, where there is another, legitimate governmental purpose served by the incidental imposition of such emotional harm, shaming does not become "punishment" under *Bell, supra*, unless it is "excessive" under the six-factor test advanced in *Bell.* an examination left undone by the majority.

[11] The majority opinion finds that the sole legitimate purposes of pretrial detainment measures must be limited to those which are appropriate to assure the detainee shows up for trial and to maintain jailhouse security, citing *Halvorsen v. Baird*, 146 F.3d 680 (9th Cir.1998). Such a finding is directly contradictory to the "perp walk" cases which allow for pretrial detainment measures if rationally related to (1) general deterrence of crime and (2) governmental operations transparency.

shown on nationwide television, or an arraignment calendar detailing the charged crimes, hanging outside a courtroom.[12] "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Time, Inc. v. Hill*, 385 U.S. 374, 388, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

Sheriff Arpaio articulated a number of purposes justifying the webcasts, only one of which—jail security—was addressed by the district court in its preliminary injunction order. Clearly, "maintaining institutional security and preserving internal order and discipline are essential goals" in the operation of a detention facility. *Bell*, 441 U.S. at 546, 99 S.Ct. 1861. However, the district court rejected the Sheriffs contention that webcams contribute to jail security, finding this task was accomplished by closed-circuit security cameras. The redundant placement of the webcams next to the security monitors indicates the webcams were an excessive response[13] to this otherwise legitimate objective. *See Valdez.*

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[12] The majority opinion cites *Houchins v. KQED*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978), for the proposition that detainees cannot be made part of a "reality show" for purposes of educating the public. *Houchins* dealt with the right, if any, of a television station to film detainees. Regardless of the self-ascribed high educational calling of public television, such stations are not charged by public statutes with the duty to deter crime or to administer jails as is Sheriff Arpaio. *Houchins* simply did not involve any of the issues framed in this litigation. Similarly, *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999), involved the claimed right of the Press to accompany police in the execution of search warrants. The issue there was a vindication of Fourth Amendment rights in the homes of the subjects of the search warrants against persons not members of law enforcement. The case is not apposite here because the Plaintiffs are not being seen in their homes; they are in jail, where their search and seizure rights are greatly circumscribed (*see Hudson v. Palmer*).

[13] This is the proper *test* under *Bell v. Wolfish*.

302 F.3d at 1046. The district court did not abuse its discretion in such finding of unnecessary redundancy.

But nowhere in the district court's order is there a discussion of the Sheriffs other justifications[14] or the webcasts: (1) deterrence of crime outside the jail; and (2) transparency of jail operations for civic purposes. The majority opinion attempts to take up this slack by addressing the first of these remaining justifications, but the attempt misses the Sheriffs points.

The district court concluded that "deterrence" of the *Maricopa* detainees from committing future crimes was impermissible pre-conviction punishment of the Maricopa detainees. Likewise, the majority opinion cites *Bell* by a disembodied quotation: "[R]etribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell,* 441 U.S. at 539, n. 20, 99 S.Ct. 1861. However, a complete reading of the *Bell* decision indicates that the Court there was talking about deterring detainees'—rather than the public's—future commission of crimes: Deterrence of the unarrested public from committing acts which would result in arrests is a different governmental purpose and presents a different issue entirely. *See Smith v. Doe*, 538 U.S. at 102, 123 S.Ct. 1140 ("Any number of governmental programs might deter crimes without imposing punishment.").

What the majority opinion avoids—perhaps because of the all-too-predictable result—is to ask the question basic to any review questioning the validity of governmental action under a rational basis analysis: were the webcasts reasonably related to the purpose of deterring public behavior that could result in pre-trial detention? The answer clearly is Yes.

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[14] Alternative purpose[s] to which [the measure] may rationally be connected." *Bell.* 441 U.S. at 538, 99 S.Ct. 1861.

As noted above, in addition to operating the Madison Street Jail, Sheriff Arpaio has been charged with the prevention of crime. I do not agree that an overly broad reading of Bell should be applied to undermine a perhaps effective method for achieving such a laudable goal as deterring crime among the public at large. Similarly unexamined is the Sheriffs purpose of providing transparency of jail operations as a civic good. *See Caldarola*, 343 F.3d at 572-73.

Sheriff Arpaio's methods to achieve his purposes of public deterrence and governmental transparency may not suit the fine sensibilities of some group advocates and jurists. But absent a violation of the constitutional rights of Plaintiffs—and I see none—such differences of opinion must be vindicated, if at all, in the ballot box, not in the courtroom.

A district court abuses its discretion when it fails to consider appropriate factors in fashioning an equitable remedy. *See Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 602-07 (9th Cir.2000). The injunction was improvidently issued in this case because the district court's order (1) is not supported by adequate consideration of the Sheriffs stated legitimate, governmental objectives, and (2) is based on the legally erroneous conclusion that all levels of possible shame constitute constitutionally prohibited "punishment," without any consideration of the factors discussed in Bell.

Accordingly, I respectfully dissent, and would reverse the judgment of the district court granting the preliminary injunction.

APPENDIX B

IN THE-UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed Mar. 11, 2003]

No. CIV 01-983-PHX-EHC

JAMIE DEMERY, *et al.*,

Plaintiffs,

v.

MARICOPA COUNTY SHERIFF JOSEPH ARPAIO, *et al.*,

Defendants.

ORDER

Pending before the Court are Defendants Sheriff Joseph Arpaio's and Maricopa County's Renewed Motions to Dismiss [Dkt. 61, 62] and Plaintiffs' Renewed Motion for Preliminary Injunction.[Dkt. 63]. The central issue before the Court is whether pretrial detainees who have not been found guilty of a crime may be subjected, without their consent, to continuous Internet broadcasting via web cameras. The Court finds the web cameras in the present case serve no rational purpose related to jail administration and thus violate the constitutional rights of the pretrial detainees.

I. Background

Plaintiffs filed a Complaint in Maricopa County Superior Court, alleging violations of Federal Civil Rights, a claim for Declaratory Judgment on behalf of twenty-four detainees in custody at the Maricopa County Jail against Defendants Maricopa County (the "County") and Maricopa County Sheriff Joseph Arpaio ("Sheriff Arpaio"), in his official capacity. [Dkt. I, Complaint (attached to Notice of Removal)].

1) Violation of Article II, section 8 of the Arizona Constitution—Right to Privacy Clause;

2) Violation of Article II, section 4 of the Arizona Constitution—Right to Due Process Clause;

3) Violation of Article II, section 2 of the Arizona Constitution—Purpose of Government Clause;

4) Common law invasion of privacy;

5) Violation of the Fourteenth Amendment to the United States Constitution—Due Process Clause;

6) Violation of the Fourteenth Amendment to the United States Constitution—Equal Protection Clause;

7) Violation of the Fourteenth Amendment to the United States Constitution—Right to be free from unreasonable searches and seizures;

8) Violation of the Fourteenth Amendment to the United States Constitution—Substantive Due Process right to be free from government created or condoned sexual harassment and/or sexually hostile environment;

9) Violation of the Fourteenth Amendment to the United States Constitution—Substantive Due Process right to treatment for serious medical conditions, i.e., accommodation for special needs arising from pregnancy;

10) Violation of the Fourteenth Amendment to the United States Constitution—Substantive Due Process right to be free from cruel and unreasonable conditions of confinement, i.e., overcrowding, unsanitary conditions, exposure to unreasonable heightened risk of communicable diseases;

11) Violation of the Fourteenth Amendment to the United States Constitution—Substantive Due Process right of minors not to be housed with adults and not to have their images involuntarily broadcast over the Internet;

12) Violation of 42 U.S.C. § 1983; and

13) Declaratory relief.

[*Id.*].

Plaintiffs filed a Motion for Issuance of Preliminary Injunction, seeking to enjoin Defendants from using four, live, 24-hour-per-day web cameras in the intake, booking, search, and holding cell areas of the Madison Street Jail, and then broadcasting those images over the Internet on a commercial website known as Crime.Com. Plaintiffs also seek to enjoin Defendants from mixing males and females in the intake and holding cell areas, as well as housing adult inmates with inmates that are minors. [Dkt. 1, Motion for Issuance of Preliminary Injunction (attached to Notice of Removal)].

On June 4, 2001, Defendants removed this case to Federal District Court. [Dkt. 1, Notice of Removal]. Both Defendants filed Motions to Dismiss. [Dkts. 4, 7]. The Court dismissed Plaintiffs' state law claims pursuant to the stipulation of the parties, leaving claims 5 through 13 in this Court. [*Id.*.]. The Court denied Maricopa County's Motion to Dismiss and ordered further briefing from the parties with respect to the issues of class action and exhaustion of administrative remedies [Dkt. 47]. The Court also denied Plaintiffs' Motion for Preliminary Injunction and Sheriff Arpaio's Motion to Dismiss without prejudice to refiling at the conclusion of briefing the Court on the issues of class action and exhaustion of administrative remedies. [*Id.*]

On November 4, 2002, Plaintiffs filed a Supplemental Brief Regarding Request for Preliminary Injunctive Relief. [Dkt. 50]. On November 25, 2002, Sheriff Arpaio filed a Response [Dkt. 51], and on December 13, 2002, Plaintiffs filed a Reply [Dkt. 55]. On February 19, 2003, the Court permitted Sheriff Arpaio to renew his Motion to Dismiss and Plaintiffs to renew their Motion for Preliminary Injunction.

On February 20, 2003, Sheriff Arpiao filed a Renewed Motion to Dismiss. [Dkt. 61]. On February 24, 2003, Maricopa County filed a Renewed Motion to Dismiss [Dkt. 62]. On March 3, 2003, Plaintiffs filed a Renewed Motion for Preliminary Injunction. [Dkt. 63].

II. Sheriff Arpaio's[1] Renewed Motion to Dismiss

Standard of Review

A court should not dismiss a claim unless convinced beyond a doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957); *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). The Complaint is construed in the light most favorable to the plaintiff. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). The Court must "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (quotation marks and citations omitted). Legal conclusions, however, couched as factual allegations are not given a presumption of truthfulness. *W. Mining*, 643 F.2d at 624.

In deciding a motion to dismiss, the Court may consider allegations contained in. the Complaint, exhibits attached to the Complaint, matters of public record, orders of record in the lawsuit, and other materials subject to judicial notice. *See e.g., Parks Sch. of Bus.*, 51 F.3d at 1484.

Discussion

In his Motion to Dismiss, Sheriff Arpaio argues that Plaintiffs' claims against him should be dismissed because 1) he was sued in his official capacity rather than his individual

[1] The issues discussed herein also apply to Maricopa County's separate Renewed Motion to Dismiss [Dkt. 62].

capacity; 2) the Prisoner Litigation Reform Act bars Plaintiffs' claims; and 3) Plaintiffs' causes of action are meritless. [Dkt. 7].

1. *Official capacity v. personal capacity*

Plaintiffs have brought this action against Sheriff Arpaio in his official capacity. [Dkt. 1, Complaint]. Public officers (state, county, municipal) named in their official capacity may be liable under § 1983 for compensatory damages. *See Mitchell v. Dupnik*, 75 F.3d 517, 527 (9th Cir. 1996) (holding that a County Sheriff was not immune from judgment for compensatory damages asserted against him in his official capacity—in reality a suit against a governmental officer is equivalent to a suit against the governmental entity.). Therefore, the Court will not dismiss Plaintiffs' Complaint against Sheriff Arpaio.

2. *Prison Litigation Reform Act*

Sheriff Arpaio argues in his Motion to Dismiss that the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, bars Plaintiffs' federal claims because Plaintiffs have not alleged that they have exhausted administrative remedies before filing this action. [Dkt. 7].

The PLRA provides in part: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies *as are available* are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). The statute defines "prisoner" as "any person incarcerated or detained." 42 U.S.C. § 1997e(h). The Court finds § 1997e(a) to be inapplicable for two reasons: first, Defendants have failed to describe what administrative remedies were available to Plaintiffs at the time of detainment; and second, many Plaintiffs were unaware of the web cameras at the time they were detained and

thus could not have filed an administrative grievance with respect to the web cameras.

"[N]onexhaustian under 1997e(a) of the PLRA does not impose. a pleading requirement." *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. January 2 2003). Instead, a defendant has "the burden of raising and proving the absence of exhaustion." *Id.* The Court finds Defendants have failed to meet this burden.

3. *Constitutional Claims Arising From the Use of Internet Cameras*

a) *Count 5. Due Process. (14th Amendment)*

In Count 5 of their Complaint, Plaintiffs allege that the use of four, live, 24-hour-per-day web cameras in the pre-intake, booking, initial search, and holding cell areas of the Madison Street Jail and the broadcasting of those images over the Internet for commercial purposes without obtaining Plaintiffs' consent or waiver deprives Plaintiffs of liberty and property in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. [Dkt. 1, Complaint at p.19].

"[T]here is no constitutionally protected-liberty interest in the preservation of one's reputation, absent some further injury to a tangible interest such as employment, because damage to one's reputation does not 'alter[ ] or extinguish[ ]' 'a right or status previously recognized by state law.'" *Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000) (quoting *Paul v. Davis*, 424 U.S. 693; 96, 711, 96 & Ct.1155, 1165 (1976) Thus, the claim that Plaintiffs are entitled to control the commercial use of their images pursuant to the Due Process Clause of the Fourteenth Amendment is without merit. However, as discussed *infra*, the Court's preliminary injunction with suspect to Defendants' use of the web cameras is premised on Plaintiffs' right as pretrial detainees to be free from punishment under the Due Process Clause of the

Fourteenth Amendment, Therefore, the Court will not dismiss Count 5 of Plaintiffs' Complaint.

b) *Count 6: Equal Protection (14th Amendment)*

Defendants argue that Count 6 of Plaintiffs' Complaint should be dismissed because Plaintiffs' allegations fail to state an equal protection violation in that Plaintiffs have not alleged that they were members of a suspect class, nor have Plaintiffs -alleged a discriminatory purpose or intent. [Dkt. 7]. In Count 6 of Plaintiffs' Complaint, Plaintiffs allege

> Defendants' practices and policies installing and using live, 24-hour-per-day webcams in the pre-intake/booking area, initial search area, and holding cell area of the Madison Street Jail facility, as described above; and Defendants' practice of broadcasting those images over the Internet for commercial purposes, without obtaining from Plaintiffs either consent or. waiver, deprive Plaintiffs of liberty and property in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

[Dkt. 1, Complaint at ¶ 63].

However, in their Combined Response to Defendants' Separate Motions to Dismiss for Failure to State a Claim, Plaintiffs state that the essence of their equal protection claim is "how a black pregnant female was treated quite differently than a white pregnant female who was in. the same cell at the same time." [Dkt. 21]. Specifically, Plaintiffs allege that one pregnant Caucasian woman was provided extra milk and an extra sandwich while other pregnant non-Caucasian women in the same holding cell were not given extra milk or sandwiches.[2] [Dkt. 1, Complaint at ¶ 40].

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[2] This allegation is not found under Count 6 of Plaintiffs' Complaint, but is stated in the "Charging Allegations" section of the Complaint under the heading "Inadequate Care and Treatment for Pregnant Women." [Dkt. 1, Complaint at 140].

In Count 6, Plaintiffs have not alleged that any of the non-Caucasian pregnant women referred to in their Complaint are named plaintiffs. [*Id.*, at ¶ 40]. "At least one named plaintiff must satisfy the actual injury component of standing in order to seek relief on behalf of himself or the class." *Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993).

Furthermore, in order for a plaintiff to prove a violation of equal protection in a § 1983 claim, the plaintiff must prove that the defendant acted in a discriminatory manner and that the discrimination was intentional. *FDIC v. Henderson*, 940 F.2d 465, 471 (9th Cir. 1991). Plaintiffs have not alleged in their Complaint that Defendants intentionally discriminated against non-Caucasian pregnant women.

With respect to Plaintiffs' equal protection claim as it concerns the webcameras, Plaintiffs have not alleged that they are members of a suspect class or that Defendants acted with a discriminatory purpose or intent. Accordingly, the Court will dismiss Count 6 of Plaintiffs' Complaint.

c) *Count 7: Right to Be Free From Unreasonable Search and Seizure (4th and 14th Amendments)*

As discussed *infra* with regard to Plaintiffs' Motion for Preliminary Injunction, Plaintiffs are unlikely to succeed on the merits of their Fourth Amendment claim with respect to unreasonable searches. However, Plaintiffs arguably have a claim for unreasonable seizure under the. Fourth Amendment. *See Ayeni v. Mottola*, 35 F 3d 680, 688 (2nd Cir. 1994). Therefore, the Court will not dismiss Count 7 at this time.

4. *Claims Based Upon "Conditions of Confinement"*

Because Plaintiffs were pretrial detainees while at Madison Street Jail and not convicted persons, their claims based upon the conditions of confinement arise under the Fourteenth Amendment's Due Process Clause rather than the Eight Amendment's prohibition against cruel and unusual punishment. *See Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir.

1986) (citing *Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 99 S. Ct. 1861, 1872 n.16 (1979)). Although Plaintiffs' claims arise under the Due Process Clause, the Eighth Amendment guarantees provide a minimum standard for determining Plaintiffs' constitutional rights as pretrial detainees. *See id.* To state an Eighth Amendment conditions of confinement claim, Plaintiffs must satisfy both an objective and subjective component to the claim. Under the objective component, Plaintiffs must demonstrate that the prison official's act or omission resulted in the denial of "the minimal civilized measure of life's necessities." *See Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977 (1994); *Keenan*, 83 F.3d 1083, 1089 (9th Cir. 1996). Under the subjective component, Plaintiffs must demonstrate that this denial occurred through the deliberate indifference of prison personnel or officers. *See Farmer*, 511 U.S. at 834, 114 S. Ct. at 1977; *Keenan*, 83 F.3d at 1089. "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837, 114 S. Ct. at 1979.

a) *Count 8: Sexually Hostile Environment (14th Amendment)*

Defendants argue that Counts 8, 9, and 10, claims that concern the conditions of confinement, should be dismissed because Plaintiffs fail to allege the deliberate indifference necessary to state a conditions of confinement claim. [Dkt. 7].

In Plaintiffs' Eighth Cause of Action, Plaintiffs allege that Defendants' practices and policies at Madison Street Jail in 1) conducting intake processing for males and females in the same area at the same time; 2) permitting male detainees to stand outside the windows of the women's holding cell and peer into the women's cell, including at times when women were using the toilet; 3) subjecting female Plaintiffs to the sight of activities in the men's holding cell (next door to the

women's holding cell);[3] 4) permitting female Plaintiffs to be subjected to men yelling lewd, gross, and sexually suggestive remarks as Plaintiffs walked past the men's holding cell (while Plaintiffs were in the company of jail staff); and 5) allowing male Plaintiffs to the sight of women exposing themselves and making sexually inviting remarks,[4] with Defendants taking no reasonable steps to reduce or prevent the sexual harassment or to alter the sexually hostile environment, violates their substantive due process rights. [Dkt. 1 at ¶67]. Plaintiffs also seek to halt the pat search procedure for both male and female detainees, contending that it facilitates a sexually hostile environment and sexually harassing activities. [*Id.* at ¶25].

Plaintiffs have alleged that such situations are "embarrassing, humiliating, and emotionally difficult," but have failed to allege that they were denied the "minimal civilized measure of life's necessities." Accordingly, Plaintiffs have failed to state a valid conditions of confinement claim. The Court will therefore dismiss Count 8 of Plaintiffs' Complaint.

b) *Count 9: Treatment for Serious Medical Conditions, i.e, Pregnancy (14th Amendment)*

In their ninth cause of action, Plaintiffs claim that the special needs of pregnant women were not met, thereby violating their substantive due process right. [Dkt. 1, Complaint at ¶¶ 27-34, 70]. Specifically, Plaintiffs allege that Defendants provided patently inadequate care and treatment for pregnant women by 1) failing to provide an alternative source of water (other than from a water fountain directly

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[3] The Court has toured the detainee area. A solid wall separates the male and female holding areas; it is impossible for a person in one holding area to view a person in the other holding area. Both holding areas can only be viewed from the outside hallway. The parties should consider this when filing future pleadings.

[4] Again, the male and female holding cells are separated by a solid wall.

over the toilet), 2) forcing pregnant women to wait up to two hours for toilet paper so they could use the toilet; 3) failing to provide pregnant women with pads, pillows, mattresses, or other cushioning from the bare concrete floor or the bare stainless steel. bunks for up to days at a time; 4) failing to provide blankets for pregnant women in the cold holding cell; 5) forcing pregnant women to remain in a single overcrowded room with 25 to 30 other women who have not been screened for measles, tuberculosis, hepatitis, or other communicable diseases extremely dangerous to the health of the unborn children of pregnant women; 6) selectively providing pregnant women with prenatal vitamins or extra food while denying vitamins and extra food to other pregnant women; 7) denying Plaintiffs access to medical care by not responding to cries of distress and pain from pregnant women who begin to experience severe cramping and potential labor pains; and 8) calling pregnant women who complain and seek medical assistance "bitches", and refusing to allow them to see a nurse for their problems when the pregnant women are within several hours of their release. As discussed *supra* in Count 6, Plaintiffs have not specifically named which pregnant women referred to in their Complaint have been subjected to these alleged violations.

Although not mentioned in the "Charging Allegations" portion of their Complaint, Plaintiffs allege under Count 9 that Defendants failed "to provide blankets for pregnant women in the cold holding cell." [Dkt. 1, Complaint at ¶ 70]. Attached to Plaintiffs Complaint is an affidavit by Plaintiff Jamie Demery, in which she state that she "was never provided with a pillow, pad, blanket, or any other physical accommodation for my pregnancy." Demery never alleges, though, that she was placed in a cold holding cell. Furthermore, Plaintiffs do not specify whether any of the named Plaintiffs were denied blankets in the cold holding cell.

> *Some* conditions of confinement may establish an Eighth Amendment violation "in combination" when

> each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets.

Wilson v. Seiter, 501 U.S. 294, 304,111 S. Ct. 2321, 2327 (1991).

Because Plaintiffs have not alleged facts in support of this claim which may entitle them to relief, the Court will dismiss Count 9.

c) *Count 10: Overcrowding, unsanitary conditions, exposure to diseases*

In Plaintiffs' Tenth Cause of Action, Plaintiffs allege that they were placed in overcrowded cells, subjected to unsanitary conditions[5], and exposed to communicable diseases. [Dkt. 1, Complaint at ¶ 72]. Although Plaintiffs allege that the overcrowded condition of the jail holding cells jeopardizes their physical safety, Plaintiffs have not alleged that anyone was denied food, water, or toilet facilities, or that anyone became injured or ill as a result of the overcrowded conditions. Accordingly, Plaintiffs have not made sufficient allegations to state a conditions of confinement claim upon which relief can be granted. The Court will therefore dismiss Count 10 of Plaintiffs' Complaint.

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[5] Plaintiffs allege that some of the unsanitary conditions they were exposed to include Defendants' failure to provide alternative source of drinking water other than from a single fountain located directly over the only toilet, Defendants' failure to provide toilet paper in a timely or reasonable matter, and Defendants' maintenance of an overcrowded cell which forced a majority of the Plaintiffs to sleep on the bare concrete floors inches from the doors or single operating toilet. [Dkt. 1, Complaint at ¶ 72].

5. *Claim 11: Minors*

Sheriff Arpaio argues that all claims brought by Plaintiff Sean Botkin, a minor, and other juvenile plaintiffs, including Count 11 which alleges that they, as minors, were improperly mixed with adults, must be dismissed because minors cannot bring civil lawsuits on their own behalf.

An individual's capacity to sue is determined by the law of the individual's domicile. Fed.R.Civ.P. 17(b); *see Johns v. County of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997) (holding that federal civil rights action was properly dismissed as to minor who lacked capacity to sue on his own under California law). Under Arizona law, "an infant cannot bring or defend a legal proceeding in person, but must sue or be sued by a legally appointed general guardian, or next friend or a guardian ad litem." *Pintek v, Superior Court*, 78 Ariz. 179, 184, 277 P.2d 265, 268 (1954); *see also Byers-Watts v, Parker*, 199 Ariz. 466, 18 P.3d 1265 (App. 2001). Accordingly, the Court will dismiss Count 11 and all other claims brought on behalf of minors in this action.

6. *Claim 12: 42 U.S.C. § 1983*

Plaintiffs' twelfth cause of action does not allege a constitutional violation separate from Plaintiffs' other causes of action but merely outlines elements that are arguably necessary to assert civil rights claims against Defendants (e.g., acting under color of state law, recurring events). The Court will dismiss Count 12, but the Court will not disregard the allegations contained in the paragraphs therein.

7. *Claim 13: Declaratory Relief*

"Declaratory judgment relief is an appropriate vehicle for resolving controversies as to the legality of acts of public officials." *Riley v. County of Cochise*, 10 Ariz. App. 55, 59, '455 P.2d 1005, 1009 (1969). Therefore, the Court will not dismiss Plaintiffs' claim for declaratory relief.

8. *Punitive Damages*

In his Motion to Dismiss, Sheriff Arpaio argues that Plaintiffs have failed to state a claim for punitive damages against him under either state or federal law. [Dkt. 7]. Plaintiffs have sued Sheriff Arpaio only in his official capacity. [Dkt. 1, ¶¶ 8, 10]. Under Arizona law, "[n]either a public entity nor a public employee acting within the scope of his employment is liable for punitive or exemplary damages." A.R.S. §12-820.04. Furthermore, 42 U.S.C. § 1983 precludes an award of punitive damages against a governmental officer in his official capacity. *Mitchell v. Dupnik*, 75 F.3d 517, 527 (9th Cir. 1996) (holding that it was error to award punitive damages against the County Sheriff in his official capacity because an award of punitive damages against the County Sheriff in his official capacity is in reality an assessment against the County, which is immune from such damages). Accordingly, Plaintiffs' claims for punitive damages against Sheriff Arpaio will be dismissed.

E. Plaintiffs' Motion for Issuance of Preliminary Injunction

1. *Standard of Review*

In order to obtain a preliminary injunction, a movant must show either (1) the likelihood of success on the merits and the possibility of irreparable injury or (2) the existence of serious questions going to the merits and the balance of hardships tipping in the movant's favor. *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993); *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990); "These two formulations represent two points oil a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases" *Diamontiney*, 918 F.2d at 795.

2. *Internet Cameras*

a) *Mootness*

Sheriff Arpaio and Maricopa County filed a Memorandum Re: Mootness against Plaintiffs Jamie Demery, *et al.* on May 17, 2002. [Dkt. 42]. Defendants allege that any violations of Plaintiffs' constitutional rights in connection with the installment of four video cameras used to broadcast images of pre-trial detainees while the detainees were being processed into the jail are now moot.

Defendants' Memorandum Re: Mootness is precipitated by a cessation of the complained-of filming via Internet cameras. The complaint originated because Sheriff Arpaio installed four, live, 24-hour cameras in the intake, booking, search, and holding cell areas of the Madison Street Jail. These cameras recorded the daily activities of pre-trial detainees in four separate locations, including a holding cell area. The holding cell area included three other cameras that pointed into cells or areas in which detainees were either held, searched, or photographed for mug shots.

Defendants filed a Memorandum Re: Mootness, now before this court, to assert that Plaintiffs' Motion for Issuance of Preliminary Injunction is moot because the continual public dissemination via the Internet of footage recorded while pre-trial detainees were being processed into the jail is no longer occurring.

The general rule is that "[w]here the activities sought to be enjoined already have occurred, and the appellate[6] courts can-

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[6] The rule always is stated with the word "appellate" used to modify the word "courts." *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871 (9th Cir.2002) (*See also Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1095 (9th Cir.2001); *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir.1978)). However, the *Bernhardt* general rule is to be applied to *both appellate and district* courts within the 9th Circuit, not just to appellate courts.

not undo what has already been done, the action is moot, and must be dismissed." *Bernhardt v. County of Los Angeles*, 279 F.3d 862 (9th Cir.2002) (quoting *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1095 (9th Cir.2001)). However, an exception exists for injuries that are "capable of repetition; yet evading review." *Id.* The exception only applies when (1) the challenged action is too short in duration to be fully litigated before cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again; *Id.* at 871-872; *see also Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir.2000).

Plaintiffs concede Sheriff Arpaio is no longer using the Internet to disperse images of pretrial detainees. Because *Crime.com* has ceased carrying the live feed from the jail, Sheriff Arpaio argues that the activities that Plaintiffs seek to enjoin have already occurred, thus rendering the action moot. Plaintiffs, in turn, assert that this action meets the exception to the general rule for mootness, as outlined in *Bernhardt*. Plaintiffs allege, and Defendants have not denied, that Sheriff Arpaio actively is searching for a new Internet host.[7] Sheriff Arpaio's active searching increases the likelihood that Plaintiffs will. be subjected to the same complained of activity, namely the filming of pre-trial detainees via Internet cameras. Sheriff Arpaio's active searching amounts to a reasonable expectation that the activity will be repeated.

Sheriff Arpaio argues the issue is also moot because the Plaintiffs are no longer in custody. In support of this argument, he has submitted a chart of the Plaintiffs' detention history. (Defendant Arpaio's Supplemental Brief Addressing

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[7] The former hosting site, http://www.crime.com, contains the following statement: "For fans of the JAIL CAM, it will be temporarily unavailable. However, the Maricopa Sheriffs office is currently seeking a new host for the site."

PLRA Issues, Exh. A) [Dkt. 51]. However, the chart is inaccurate. For example, Plaintiff Benny Berryman is listed as having been detained only three times, when if fact he has been incarcerated—over a dozen times, including four times during the course of this lawsuit. (Defendant Arpaio's Reply re: Mootness, Exh. A) [Dkt. 44]. The Court does not know whether any Plaintiffs are currently being detained.

Sheriff Arpaio's "burden of demonstrating mootness is a heavy one." *Natural Resources Defense Council, Inc. v. Evans*, 316 F.3d 904, 910 (9th Cir. 2003). The Court finds Sheriff Arpaio has failed to meet this burden.

b) *Likelihood of Sucess on the Merits*

Fourth Amendment

"Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context,[8] we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell, and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200 (1984). Although the plaintiff in *Hudson* was a prisoner instead of a pretrial detainee, the Court did not hold prisoners lost their Fourth Amendment rights because they were convicted prisoners. Rather, the reasoning was similar to the pragmatic rationale for restricting the constitutional rights of pretrial detainees—that the realities of running a prison make the Fourth Amendment "fundamentally incompatible with the close and continual surveillance of inmate and their cells required to ensure institutional security and internal order." *Hudson*, 468 U.S. at 527-28, 104 S. Ct. at 3201; *cf. Bell v. Wolfish*, 99 S. Ct. 1861, 1878, 441 U.S. 535, 546-47 (1979)

[8] The present case arguably demonstrates why such caution is necessary.

(limiting the constitutional rights of pretrial detainees based on administrative and security concerns). Therefore, the holding in Hudson arguably applies to pretrial detainees as well, and Plaintiffs do not have a Fourth Amendment right to enjoin Defendants' use of the web-based cameras.

Due Process Clause of the Fourteenth Amendment

"Our holding that respondent does not have a reasonable expectation of privacy enabling him to invoke the protections of the Fourth Amendment does not mean that he is without a remedy for calculated harassment unrelated to prison needs." *Hudson*, 468 at 530, 104 S. Ct. at 3202. "It is true that inmates lose many rights when they are lawfully confined, but they do not lose all civil rights." *Houchins v. KOED, Inc.*, 438 U.S. 1, 5 n.2, 98 S.Ct. 2588, 2592 n.2. (1978) (Burger, C.J., plurality opinion). "Inmates in jails, prisons or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others." *Id.*

To determine whether a jail policy violates the Due Process rights of a pretrial detainee, a court must decide whether the policy "is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Wolfish*, 441 U.S. at 538, 99 S. Ct. at 1873 "Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on 'whether an alternative purpose to which [the restriction] may, rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Id.* (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68 (1963)). "In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that such

considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters?' *Id.*, 441 U.S. at 540 n.23, 99 S.Ct. at 1875 n.23.

Here, Sheriff Arpaio asserts that the main purpose of the Internet cameras is secunity and, as such, public policy would not favor a Preliminary Injunction. Sheriff Arpaio asserts that the web-based cameras are necessitated by security concerns; however, this Court finds that closed-circuit security cameras already exist in the same areas. Web-based cameras are merely duplicative and used solely for public viewing, for which no need exist. The web-based cameras thus amount to an exaggerated response to an already-fulfilled security need. With closed-circuit cameras located within inches of the web-based cameras, this Court finds Defendant's security argument unpersuasive. The extended search that occurs when a camera allows the public to peer in from a remote location is manifestly unreasonable due to the absence of any security or administrative need. Despite the need for contraband searches, no need exists for web-based cameras. Therefore, the filming via web based camera amounts to punishment in. violation of Plaintiffs" Fourteenth Amendment Due Process rights.

Defendants, As State Actors, Do Not Have a First Amendment Right to Free

In defense of their use of web-based cameras, Defendants argue an "arm of local government" has a First Amendment right to discuss political positions. *See Downs v. Los Angeles Unified School District*, 228 Feed 1003 (9th Cir. 2000). However, *Downs* speaks to whether a school board may restrict the speech of an employee when such speech, in the form of a bulletin board posting, is in contravention to the

tolerance of homosexuals advocated by the school. The court did not determine that the school's position was protected by the First Amendment. Rather, the court held that the school had the right to restrict opposing views of speech attributable to the school. 228 F.3d at 1009.

The Court is unaware of any authority holding a local government may assert a First Amendment right against private individuals. The freedoms guaranteed in the Bill of Right protect the individual from the government, not the other way around.[9]

3. *Mixing of Adults and Juveniles*

Although Plaintiffs fail to argue the point in their Motion for Issuance of Preliminary Injunction in their Complaint, Plaintiffs request an injunction preventing Defendants from housing adult inmates with inmates that are minors. [Dkt. 1, Complaint at 28]. According to Defendants, adults and juveniles are housed separately at Maricopa County Jail, and Plaintiffs cannot show a substantial likelihood of success on this claim.

Accordingly,

IT IS ORDERED that Sheriff Arpaio's and Maricopa County's Renewed Motions to Dismiss [Dkts. 61, 62] are GRANTED IN PART and DENIED IN PART. Counts 6, 8, 9, 10, 11, and 12 of Plaintiffs' Complaint and Plaintiffs' claim for punitive damages are dismissed.

IT IS FURTHER ORDERED that Plaintiffs' Renewed Motion for Preliminary Injunction [Dkt. 63] is GRANTED.

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[9] A case that illustrates this distinction is *Canadian Coalition Against the Death Penalty v. Stewart*, CIV 02-1344-PHX-EHC. In that case, this Court held the First Amendment allows Internet providers to communicate with prisoners for the purpose of publishing the prisoners' letters on the Internet. *See id.*, December 16, 2002 Order. [Dkt. 25].

Sheriff Arpaio is enjoined from placing and using in Madison Street Jail web cameras that broadcast images to the Internet.

DATED this 10th of March, 2003.

/s/ Earl H. Carroll
EARL H. CARROLL
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Oct. 21, 2004]

No. 03-15698
D.C. No. CV-01-00983-EHC
District of Arizona, Phoenix

JAMIE DEMERY, *et al.*,
Plaintiffs-Appellees,

v.

JOE ARPAIO, Maricopa County Sheriff,
in his official capacity,
Defendant-Appellant,

and

COUNTY OF MARICOPA, *et al.*,
Defendants.

Before: PAEZ, BERZON, and BEA, *Circuit Judges*.

Judges Paez and Berzon have voted to deny the petition for rehearing en banc. Judge Bea voted to grant the petition.

The full court had been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. The Petition for Rehearing En Banc is DENIED.

FILED
MAY 27 2005

No. 04-983

IN THE
Supreme Court of the United States

JOE ARPAIO,
Maricopa County Sheriff, in his official capacity,
Petitioner,

v.

JAMIE DEMERY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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May 27, 2005

QUESTION PRESENTED

Whether the court of appeals properly upheld a preliminary injunction barring a county sheriff from placing video cameras in the non-public areas of a jail—including the men's bunk bed area, the women's toilet, and the areas in which pretrial detainees are subjected to patdown searches—and broadcasting live images from those cameras through a commercial Internet site 24 hours a day, because such a practice likely violates the due process rights of pretrial detainees to be free from punishment.

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RESPONDENTS' BRIEF IN OPPOSITION

The district court's order granting a preliminary injunction in this case, which the decision below affirmed, applied well-settled legal principles to an extremely unusual set of facts. As far as respondents are aware, no other jailer in the United States has done what petitioner has done here: place video cameras in the non-public areas of a jail and continuously broadcast live images of pretrial detainees as they are fingerprinted, photographed, booked, and searched; as they sleep; and even as they use the toilet. The unique nature of these facts, standing alone, demonstrates that this case does not present a recurring question worthy of this Court's review. And given the significance of a factual record in a case of this kind, the interlocutory posture of the case provides an additional reason to deny certiorari.

This Court should also decline review because the conflicts claimed by the petition are illusory. The petition argues that the decision below implicates a circuit split concerning the correct legal standard to apply to conditions of confinement claims by pretrial detainees, but the circuits uniformly apply the same standard. The petition also attempts to manufacture a conflict with cases involving sex offender notification laws and perp walks. Far from conflicting with the decision below, however, these other cases *support* it: They suggest that a policy of public humiliation that goes beyond the dissemination of information is likely to be deemed punitive, and that the government's role in such matters must be carefully circumscribed. Finally, the petition's broad suggestion that *any* governmental infliction of humiliation is insulated from constitutional scrutiny is without support in this Court's cases.

STATEMENT

A. Factual Background

Petitioner Joe Arpaio is the Sheriff of Maricopa County, Arizona. Sheriff Arpaio has become widely known for his unconventional correctional practices. Pretrial detainees in his jails are forced to wear pink underwear, eat green bologna, work on chain gangs, dig graves, and sleep in tents in the Arizona desert. *See* Barry Graham, *Star of Justice*, Harper's, Apr. 30, 2001, at 59. Arpaio's website boasts about the unique nature of his practices. *See* Maricopa County Sheriff's Office Website, http://www.mcso.org/submenu.asp?file=aboutmcso &page=main (last visited May 16, 2005) ("No other detention facility in the country . . . can boast of 1200 convicts in tents; no other county or state facility can boast of a gleaning program that results in costs of under 45 cents per meal per inmate; few others can say they have women in tents or on chain gangs."). Arpaio has said of his jails: "I want to make this place so unpleasant that they won't even think about doing something that could bring them back. . . . I want them to suffer." Richard Lacayo, *The Real Hard Cell*, Time, Sept. 4, 1995, at 31. One commentator has observed that Arpaio "boasts of being 'America's toughest sheriff' and has the litigation docket to prove it." Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1581 n.82 (2003).

Respondents are pretrial detainees at the Madison Street Jail who sued both Arpaio and the County, challenging Arpaio's practice of installing video cameras, known as "webcams," in four locations within the jail and broadcasting live images of the detainees over the Internet. The petition repeatedly describes the location of the cameras as the "public area of [the] jail." Pet. i. This description is inaccurate. As the court of

appeals explained, "[t]he four webcams were placed within areas of the jail that were not open to the public except through prearranged tours." App. 2a. The cameras were installed in four locations: the men's holding cell, including the men's bunk bed area; the area in which detainees are photographed, fingerprinted and booked; the area in which detainees are subjected to patdown searches; and the toilet and surrounding area in the women's holding cell. *Id.* at 2a-3a. The camera in the latter location was eventually moved to a hallway in response to this lawsuit. *Id.* at 3a.

After the capacity of his web servers became overwhelmed by viewers from around the world, Arpaio entered into an arrangement with a commercial website known as Crime.com to broadcast the webcam images on a 24-hour basis. *Id.* Crime.com presented the images as a form of entertainment, offering visitors the opportunity to see detainees "booked, searched and locked-up," and "[w]atch as SWAT teams raid male and female inmate holding cells in search of smuggled drugs and crude weapons." *Id.* at 4a. A link labeled "Meet Sheriff Joe" allowed visitors to "[s]pend a day in the life of Sheriff Joe Arpaio on his own turf, where inmates wear pink underwear, eat green bologna, and work on chain gangs." *Id.* In addition to broadcasting the video footage, the site also sold merchandise associated with Arpaio, including a videotape of "A Day With Sheriff Joe," which was described as a documentary film about the Sheriff's "unconventional" methods, and a souvenir version of the pink underwear worn by Maricopa County detainees, which was emblazoned with a gold star insignia, Arpaio's personal signature, and the slogan "Go Joe." *See* Complaint, Exh. B; Joe Arpaio for Sheriff Website, www.reelectjoe.com (last visited May 16, 2005) (describing "commercial" version of pink underwear).

The webcam broadcasts attracted "3 million to 10 million hits daily." Heather Haddon, *Sneak Peek: 'Jail Cam' Raises Hackles and a Lawsuit When Links to Porno Sites Are Discovered*, Village Voice, June 6-12, 2001. Among the millions of visitors to the site were those directed "from hundreds of hardcore pornography sites." *Id.*; *see also* Ninth Circuit Excerpts of Record ("EOR") Tab 71 at 13-15. For reasons that are not disclosed in the record, the Crime.com site ceased operation after this suit was filed.

Arpaio gave numerous interviews to the media concerning the webcam broadcasts. He bragged that the broadcasts drew "people from Sweden, Britain, and Germany to watch officers snap on rubber gloves and frisk incoming arrestees" and chuckled over the broadcasts' ability to "embarrass the inmates." Haddon, *supra*. Asked whether he expected other jails or prisons to adopt his webcam policy, Arpaio said that he did not: "I don't think anybody's going to do it. I've done a lot of controversial things. Nobody's copied it, but I don't care." *See* Farhad Manjoo, *The Sheriff Can't Beat the Rap,* Wired News http://wired-vig.wired.com/news/culture/0,1284,42872,00.html (last visited May 16, 2005).

The detainees filed this suit in Arizona state court and the defendants removed the case to federal court. After determining that there was a live controversy because Arpaio was seeking a new host for the webcam images, the district court preliminarily enjoined Arpaio from broadcasting the webcam images on the ground that doing so subjected the detainees to punishment in violation of the Fourteenth Amendment. Arpaio appealed. Maricopa County did not appeal.

B. The Court of Appeals' Decision

Although neither party raised the issue on appeal, the court of appeals began by assuring itself that the appeal was not moot because Arpaio intended to, and likely would, find another host for the website, and because, although the plaintiffs had been released from the jail, the controversy fell within the capable-of-repetition-but-evading-review exception to the mootness doctrine. App. 5a-9a.

The court next concluded that the district court had correctly analyzed plaintiffs' claims under the test set forth in *Bell v. Wolfish*, 441 U.S. 520 (1979). App. 10a-12a. In *Bell*, the Court held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." 441 U.S. at 535. The *Bell* test asks whether a particular condition of confinement constitutes punishment or "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation" to that purpose. *Id.* at 538. The court of appeals concluded that the four-part "rational relation" test for Eighth Amendment claims set forth in *Turner v. Safley*, 482 U.S. 78 (1987), was inapplicable because *Turner* dealt with convicted prisoners rather than pretrial detainees and because *Turner* involved a claim of cruel and unusual punishment under the Eighth Amendment rather than a substantive due process claim. App. 11a.

Having found that Arpaio had "failed to demonstrate that the district court applied an erroneous legal standard," the court of appeals next turned to Arpaio's arguments concerning "the district court's application of *Bell* to the facts of this case." *Id.* at 12a. These arguments, the court concluded, ignored the

standard for review of a preliminary injunction, under which "[a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Id.*

"Additionally," the court "agree[d] with the district court's application of the law to the facts." *Id.* Arpaio's actions constituted punishment because the humiliation of having one's daily activities in jail broadcast over the Internet would be regarded by anyone as profoundly undesirable and because the harm caused significantly exceeded, and was independent of, the ordinary discomfort involved in being jailed. *Id.* at 13a. The practice could not be justified based on an interest in deterrence alone because "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell*, 441 U.S. at 539 n.20. Moreoever, the court explained, Arpaio's practices could not be justified based on the otherwise valid interest in ensuring accountability and public scrutiny because none of the purposes of pretrial detention was served by the broad exposure involved in the Internet broadcasts. App. 15a-17a (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978) (plurality) ("Inmates are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others."); *Wilson v. Layne*, 526 U.S. 603 (1999)).

Finally, the court rejected Arpaio's argument that the injunction violated *his* First Amendment rights because, as the district court put it, "the Bill of Rights protect the individual from the government, not the other way around." *Id.* at 18a.

Judge Bea dissented, explaining that he would have reversed on mootness grounds. *Id.* at 20a-23a. He also

expressed his disagreement on the merits, reasoning in part that the Internet broadcasts would not have been historically regarded as punishment because they "are too new to have a historical characterization," *id.* at 27a, and suggesting that public shaming is punitive only when "characterized by face-to-face confrontation or banishment." *Id.* at 29a n.7.

Arpaio filed a petition for rehearing en banc. No judge of the court of appeals requested a vote on the petition, and the petition was denied.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Over the Appropriate Legal Standard for Conditions-of-Confinement Claims by Pretrial Detainees.

The petition asserts that the "circuit courts are split on whether the correct test to apply to detainees' conditions-of-confinement claims is the *Bell* 'punishment' test or the *Turner* 'rational relation to legitimate penological interests' test." Pet. 12. There is no such split. Every federal circuit holds that *Bell* supplies the correct test for conditions-of-confinement claims by pretrial detainees.

The absence of any conflict is made clear by recent decisions of the Fourth and Second Circuits—the two circuits that the petition identifies as following a different rule—both of which have reaffirmed their use of the *Bell* test for claims of pretrial detainees. *See Slade v. Hampton Roads Regional Jail*, --- F.3d ---, 2005 WL 1076559 (4th Cir. May 9, 2005), at * 7 (The federal circuits' decisions "reviewing conditions of pretrial detention and confinement still rely exclusively on *Bell*. Accordingly, absent an explicit indication to the contrary from

the Supreme Court, we will continue to apply *Bell* . . . to claims by pretrial detainees that certain conditions of confinement amount to punishment.") (citations omitted); *Benjamin v. Fraser*, 343 F.3d 35, 49-50 (2d Cir. 2003) (holding that *Bell* supplies the correct test for claims by pretrial detainees). Indeed, the Fourth Circuit's opinion in *Slade* specifically cites the decision below as reflecting the circuits' uniform approach. 2005 WL 1076559, at *7.

The petition creates its "split" only by distorting *Hause v. Vaught*, 993 F.2d 1079 (4th Cir. 1993), and *Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992)—the only two decisions it describes as having applied *Turner* to claims by pretrial detainees. Pet. 23. Although both decisions refer to Eighth Amendment jurisprudence, neither rejects *Bell* in favor of *Turner* as the appropriate framework. On the contrary, *Hause* cites *Bell* as the appropriate standard to evaluate restrictions placed on the receipt of outside publications by pretrial detainees and merely seeks guidance from *Thornburgh v. Abbott*, 490 U.S. 401, 404 (1989), which analyzed similar restrictions in the prison context under *Turner*. *Hause*, 993 F.2d at 1082. The court notes that, "[a]lthough *Thornburgh* did not involve pretrial detainees," the security concerns at issue were essentially the same and thus followed *Thornburgh*'s analysis "with due regard for the particular circumstances of pretrial detainment." *Id.* (citing *Bell*, 441 U.S. at 546 n. 28).

Similarly, in *Covino*, the Second Circuit found *Turner* "instructive" on the issue of whether prison officials were justified in intruding on the Fourth Amendment rights of a pre-trial detainee who was housed in a prison alongside convicted criminals and who challenged the prison's search policy. *Id.* at 78. But *Covino* expressly declined to consider whether the plaintiff's "status as a pre-trial detainee entitled him to more

extensive fourth amendment protection with respect to visual body-cavity searches than a convicted, incarcerated inmate" because, as to both pre-trial detainees and convicted inmates, the proper inquiry was whether the searches were reasonable. *Id.* at 78 n.4 (citing *Bell*, 441 U.S. at 558).

That courts make reference to this Court's Eighth Amendment precedents in the context of claims by pretrial detainees does not mean that there is a conflict concerning the appropriate legal standard. It is not surprising that courts seek guidance from Eighth Amendment jurisprudence, particularly in cases where this Court has already addressed the constitutionality of the type of restriction at issue in the prison context. Because the Court has made clear that the protections afforded by the Due Process Clause are "at least as great as the Eighth Amendment protections available to a convicted prisoner," *City of Revere v. Mass. General Hosp.*, 463 U.S. 239, 244 (1983), the Eighth Amendment provides a minimum standard for determining the constitutional rights of pretrial detainees.[1]

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[1]The petition studiously avoids stating a position on whether the court of appeals should have applied *Turner* instead of *Bell*—or whether it would even make any difference on the facts of this case. Indeed, petitioner's briefing in the court below analyzed the due process claim *only* under *Bell* and recognized that the *Turner* test is "incompatible" with the right of pretrial detainees to be free from punishment. Def's Opening Br. at 15 n.9 ("Sheriff Arpaio does not include any discussion of the four-part *Turner* test because it is inherently incompatible with the nature of the constitutional right relied on by the District [Court]–a detainee's freedom from 'punishment.'"). In any event, the suggestion in the petition that *Turner* may have somehow displaced *Bell* or eliminated the important distinction between the rights of pretrial detainees and the

Because there is no conflict concerning the appropriate legal standard, the petition should be denied.

II. The Decision Below Does Not Conflict With Cases Concerning Megan's Laws or Perp Walks.

The petition also contends that the decision below conflicts with decisions "holding that enhancing transparency of the criminal justice system and deterring the viewing public are legitimate governmental objectives." Pet. 11. That assertion is belied by the court of appeals' specific recognition that the government *does* have a "legitimate interest in 'informing the public about the administration of criminal justice.'" App. 17a (quoting *Wilson v. Layne*, 526 U.S. 603 (1999)). Far from rejecting that principle, the decision below held that, *based on the particular facts in this case*, the plaintiffs would likely succeed in establishing that, under *Bell*, the practice of broadcasting live images of pretrial detainees in their cells over the Internet could not be justified by the "otherwise valid governmental interest in assuring accountability and public scrutiny." *Id.*

In an effort to manufacture a conflict on this point, the petition cites cases in which courts have upheld sex offender notification laws and perp walks as reasonably related to legitimate state interests. Pet. 11 (citing *Caldarola v. County of Westchester*, 343 F.3d 570 (2d Cir. 2003); *Smith v. Doe*, 538

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rights of convicted prisoners (Pet. 5, 22-24) is wrong. *See, e.g., Sandin v. Conner*, 515 U.S. 472, 484 (1995) (post-*Turner* decision stating that "*Bell* correctly noted that a detainee 'may not be punished prior to an adjudication of guilt in accordance with due process of law.' . . . The punishment of incarcerated prisoners, on the other hand, serves different aims than those found invalid in *Bell*.").

U.S. 84 (2002); *E.B. v. Vernerio*, 119 F.3d 1077 (3d Cir. 1997)). These cases involve not only very different facts, but entirely different constitutional provisions—the Double Jeopardy Clause, the Ex Post Facto Clause, and the Fourth Amendment.

More importantly, not one of these decisions holds that *any* practice that happens to disseminate truthful arrest or conviction information is *always* reasonably related to a legitimate state interest. On the contrary, these cases suggest that the government's role in such matters must be carefully circumscribed, that constitutional analysis must take into account all of the relevant facts and circumstances, and that public shaming that goes beyond the dissemination of information will likely be deemed punitive.

In *Caldarola*, for example, the question was whether a perp walk—in which a public officer arrested on corruption charges was videotaped as he was escorted across the parking lot of a government building to a police car—was an unreasonable search or seizure under the Fourth Amendment. Only after engaging in "a contextualized reasonableness analysis that seeks to balance the intrusion on privacy caused by law enforcement against the justification asserted for it by the state," 343 F.3d at 576, and taking into account all of the circumstances, including the officer's "minimal expectation in privacy in the parking lot," did the court conclude that there was no Fourth Amendment violation, *id.* at 577; *compare Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000) (perp walk staged for the benefit of videotaping was unconstitutional). Most importantly, in a passage that appears particularly prescient here, the court stressed that its decision did "not suggest that government actors have free reign to use videotape or other potentially overly intrusive means to achieve the government purposes" of

informing the public, enhancing the transparency of the criminal justice system, or deterring others from attempting similar crimes. 343 F.3d at 577.

Cases involving sex offender notification laws, also known as Megan's Laws, provide even less support for the petition's claims of conflict. In *Smith v. Doe*, this Court held that Alaska's Megan's Law did not violate the Ex Post Facto Clause because the law was rationally related to the nonpunitive purpose of protecting the public by alerting citizens to the risk of sex offenders in the community, and because the law was not excessive in relation to that purpose. *Smith*, 538 U.S. at 102-3; *accord Verniero*, 119 F.3d at 1098. No similar governmental interest is even remotely implicated in this case, and neither *Smith* nor *Verniero* held that transparency or deterrence concerns alone could justify the Alaska or New Jersey laws under review.

The petition, however, quotes isolated language from *Smith* and *Verniero* discussing the virtue of transparency in the criminal justice system and attempts to extract from that language a blanket approval for government policies executed in the name of transparency. Pet. 15, 21 (asserting that "federal courts uniformly hold that disseminating accurate public information regarding criminal history does *not* constitute punishment"). A quick glance at these decisions demonstrates that the petition has taken this language out of context and twisted its meaning. If anything, this Court's decision in *Smith* lends considerable *support* to the decision below. *Smith*'s comments on transparency in the criminal justice system are found in a passage in which this Court expressly distinguished Alaska's Megan's Law from colonial punishments "that were meant to inflict public disgrace," "such as public shaming" and "humiliation," which, like the webcam broadcasts at issue here,

"involved more than the dissemination of information." 538 U.S. at 97-98; *accord Verniero*, 119 F.3d at 1100 (distinguishing New Jersey's Megan's Law from "the stocks, cages and scarlet letters"). "By contrast," the Court noted, "the stigma of Alaska's Megan's Law results not from the public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public." 538 U.S. at 98; *accord Verniero*, 119 F.3d at 1099 ("The 'sting' of Megan's Law for [sex offenders] results not from their being publicly displayed for ridicule and shaming but rather from the dissemination of accurate public record information about their past criminal activities. . . . This distinction makes a substantial difference when one looks for the relevant historical understanding of our society."). Arpaio cannot draw the same distinction in this case.

III. The Decision Below Does Not Conflict With *Paul v. Davis*

The petition argues, without much elaboration, that the decision below conflicts with this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976). Pet. 11, 20. There, a man who had been arrested for shoplifting sued the police, who had disseminated a flyer including his name and photograph under the heading "Active Shoplifters." The Court held that the man's interest in his reputation, standing alone, did not implicate any "liberty" or "property" interests sufficient to invoke the procedural protections of due process. 424 U.S. at 710-12. To hold otherwise, the Court reasoned, would result in the wide-ranging constitutionalization of ordinary defamation. The plaintiff in *Paul* also alleged a violation of a "right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments." *Id.* at 712. Because the plaintiff's claim was "based, not upon any challenge to the State's ability

to restrict his freedom of action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of an official act such as an arrest," the Court rejected this claim as too "far afield" of its substantive privacy jurisprudence. *Id.*

In this case, the court of appeals itself succinctly explained why its decision is fully consistent with *Paul*. First, *Paul* involved procedural due process and substantive privacy claims. It did not involve the substantive due process right of pretrial detainees to be free from punishment, and the release of the information was not a condition of detention. App. 17a n.6. Second, "there is stark difference between releasing an arrest record and thereby publicizing only 'the fact of [a detainee's] arrest,' and streaming live images of a pretrial detainee's every movement across the Internet." *Id.* (quoting *Paul*, 424 U.S. at 713). Third, "[n]othing in *Bell* requires that, to be punishment, a harm must be independently cognizable as a separate constitutional violation." *Id.* 13a. Thus, the holding here that particular conditions of pretrial detention involving humiliation can constitute punishment does not suggest that reputational harm alone may otherwise give rise to an independent constitutional tort.

Stretching to invent a conflict on this point, the petition suggests that *Paul* stands for a categorical rule that "[r]eputational harm is not an injury that is constitutionally redressible," (Pet. 19), and asserts that "every federal circuit has recognized that reputational harm is not constitutionally redressable," (Pet. 20), but the petition cites *not a single case* in support of that bold proposition. Under the petition's novel and expansive reading of *Paul*, *any* governmental practice that involves the infliction of humiliation or stigma—including the colonial shaming punishments discussed by this Court in *Smith*

v. Doe—would be immune from constitutional scrutiny, even if inflicted on citizens who have not been convicted of a crime. *But see Smith*, 538 U.S. at 99 (Megan's Law, "[i]n contrast to the colonial shaming punishments," "does not make publicity and the resulting stigma an integral part" of its scheme); *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (recognizing the "risk of particular discomfort and humiliation" as a component of an "obvious" Eighth Amendment violation). Nothing in this Court's decisions or American constitutional jurisprudence supports such a theory.

III. The Interlocutory Posture of This Case and Its Unique Facts Make This Case Particularly Unsuitable for Review.

Finally, even apart from the absence of any conflicts implicated by the decision below, certiorari should be denied because the procedural posture of the case and the unusual nature of the facts make this case particularly unsuitable for review.

This case comes to the Court in an interlocutory posture, which "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Although the district court found that plaintiffs had demonstrated a sufficient likelihood of success on their substantive due process claim to warrant preliminary injunctive relief, proceedings on the merits have not yet begun. Moreover, the district court made no formal factual findings, there is only a barebones record, and the court below exercised only the "limited review" appropriate to an appeal from a district court's order granting a preliminary injunction. App. 9a. Because the parties have not yet taken discovery, many potentially important factual issues remain unexamined,

including the nature of Arpaio's contract with the Crime.com website, if any; whether Arpaio was paid for the webcam broadcasts or the sales of merchandise on the website; and the circumstances surrounding the placement of a camera in the women's toilet area. Indeed, factual issues prevent the parties from even agreeing on how the issue in this case should properly be framed: Arpaio maintains that the webcams broadcast images of the "public area" of the jail, while the plaintiffs insist that the relevant areas are non-public. *See* App. 3a. Obstacles of this sort are among the reasons that, even when an important threshold question has been decided by a court of appeals, this Court will "generally await final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari); *see* Stern and Gressman, *Supreme Court Practice* § 4.18 (8th ed. 2002). That customary practice is well-suited for the interlocutory petition in this case.

The unusual, indeed unique, nature of the facts here also counsels against review. Unlike the Megan's Laws and perp walks at issue in the cases cited in the petition, there is no indication that Arpaio's webcam broadcasting is any more likely to become widespread among correctional agencies than his other unusual practices.[2] As noted at the outset, Arpaio has publicly stated that he does not expect other jails to imitate his webcam policy. *See* Manjoo, *supra*. There is therefore no

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[2]Respondents are aware of only one other jail or prison in the nation that has installed a webcam. *See* Anderson County, Tennessee Sheriff's Department Website, http://www.tnacso.net/cont/jailcam.php (last visited May 16, 2005). This single camera appears to show only the front desk of the jail.

reason to believe that the question presented will recur. Absent any indication that this case presents recurring issues of national importance, this Court should decline review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUN 6 - 2005
OFFICE OF THE CLERK

(3)

No. 04-983

IN THE

Supreme Court of the United States

JOE ARPAIO,
Maricopa County Sheriff, in his official capacity,
Petitioner,

v.

JAMIE DEMERY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTRODUCTION

The Ninth Circuit held that the substantive due process rights of pretrial detainees were violated when images of them from cameras installed in the public areas of a jail were broadcast over the internet. In order to reach this conclusion, the court made several independent legal errors that conflict with decisions by this Court and other courts of appeals and thus warrant certiorari.

First, the court held that the cameras were unconstitutional because Sheriff Arpaio's reason for installing them—to deter the viewing public from committing crime—was an illegitimate government purpose. The court believed that to deter is to punish, and punishing those, like pretrial detainees, who have not been convicted violates due process. In doing so, however, the court conflated two distinct types of deterrence—specific and general. Although seeking to deter the detainee himself from committing future crimes ("specific deterrence") might constitute an illegitimate punitive government purpose, this is not so in seeking to deter the public ("general deterrence"), as the Second Circuit has squarely held. Respondents completely ignore this point in their opposition.

Second, the court held that the cameras were unconstitutional because the other reason Sheriff Arpaio installed them—to increase the transparency and accountability of jailers to the public—was not rationally related to the use of internet broadcasts because the broadcasts went beyond those living in Maricopa County. But, in *Smith v. Doe*, this Court held that the overinclusiveness of a broadcast of information does not make the broadcast unreasonable. To be sure, *Smith* was based on a different constitutional provision (the Ex Post Facto Clause) than the one at issue here, but this Court uses the same doctrinal test for both provisions.

Third, the Ninth Circuit held that the cameras were unconstitutional because the widespread dissemination of public information causes an injury that is protected by the Due Process Clause. But, in *Paul v. Davis*, this Court held precisely to the contrary. Respondents argue that *Paul* is inapposite because it involved procedural due process, but this Court rejected that argument in the very opinion that first established the substantive due process test governing the confinement of pretrial detainees, *Bell v. Wolfish*.

Fourth, the Ninth Circuit's holding stemmed from its decision to apply *Bell* rather than this Court's later decision in *Turner v. Safley* to respondents' claims. This conflicts with the approach of two other courts of appeals. Respondents argue that there are intracircuit splits in these courts of appeals, but the fact that there are intracircuit as well as intercircuit splits is even more reason for this Court to resolve the confusion in the lower courts.

Finally, despite these conflicts, respondents assert a number of reasons why this Court should decline to review this case, none of which has any merit. For example, respondents assert that no other holding facility has "done what petitioner has done here," Opp. at 1, but a quick internet search shows otherwise. In any event, the Ninth Circuit's holdings threaten many similar practices, such as the more widespread one of publishing in the newspaper the names of those arrested for soliciting prostitution. This Court should grant the petition.

ARGUMENT

I. RESPONDENTS DO NOT DISPUTE THAT THE NINTH CIRCUIT'S DETERRENCE HOLDING CONFLICTS WITH A DECISION BY THE SECOND CIRCUIT.

As the Ninth Circuit acknowledged, Sheriff Arpaio installed the internet cameras in the public areas of the jail to "deter crime because the public, having viewed the process of

fingerprinting, pat-down searches, and pretrial detention will decide that being arrested and confined in a pretrial detention center is a fate to be avoided." Pet. App. 14a-15a. As the Ninth Circuit also acknowledged, so long as deterring the viewing public constitutes a "'legitimate governmental purpose'"—i.e., a purpose other than punishing the detainees—then installing the internet cameras for that reason is constitutional. *Id.* at 14a.

Nonetheless, the Ninth Circuit held that Sheriff Arpaio's desire to deter the viewing public was an illegitimate government purpose. The court came to this conclusion because this Court said in dicta in *Bell* that deterrence, "as one of 'the traditional aims of punishment,'" is "'not [a] legitimate nonpunitive governmental objective.'" *Id.* at 15a (quoting *Bell v. Wolfish*, 441 U.S. 520, 538, 539 n.20 (1979)).

The trouble with the Ninth Circuit's reasoning is that when this Court in *Bell* mentioned that to deter is to punish, it was speaking of deterring and punishing *the pretrial detainee*.[1] That is, making pretrial detention more unpleasant for the detainee for the purpose of deterring him from committing future crimes might constitute punishment of the detainee. In criminal law parlance, this is known as "specific deterrence." *See, e.g., United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994) ("'[S]pecific' deterrence means deterring this offender from repeating his offense.").

In this case, however, Sheriff Arpaio installed the cameras in order to deter not the detainees from committing more crimes, but to deter *the viewing public* from committing crimes. In criminal law parlance, this is known as "general deterrence." *See, e.g., id.* ("'General' deterrence means deterrence of others besides the offender . . . ."). In a judicial sleight of hand, the Ninth Circuit conflated general deterrence

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[1] This is clear from the Court's connection of "deterrence" to "retribution," *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979), the latter of which can only refer to the detainee.

with specific deterrence, thereby holding that even the Sheriff's effort to deter *others* qualifies as an effort to punish *detainees* and, accordingly, constitutes an illegitimate government purpose. Pet. App. 16a ("Thus, Sheriff Arpaio cannot point to deterrence, general or specific, as a legitimate government interest . . . .").

In doing so, it is undeniable that the Ninth Circuit has created a split with the Second Circuit, which, when it upheld the practice of parading an accused before the media as he enters a courthouse for processing, very clearly held that seeking to "deter others from attempting similar crimes" is a "legitimate government purpose[]." *Caldarola v. County of Westchester*, 343 F.3d 570, 576 (2d Cir. 2003). Not only is this undeniable, but respondents do not even attempt to deny it. Although this argument was clearly made in the petition, *see, e.g.*, Pet. at 17 ("To be sure, deterrence and retribution *of an accused* for committing a crime of which he has not yet been convicted would not be a legitimate goal. But deterrence of the viewing public is a legitimate governmental objective. *Caldarola*, *supra*." (citations omitted)), respondents do not answer it in any way in their opposition.

II. THE NINTH CIRCUIT'S HOLDING THAT THE INTERNET TOO WIDELY DISSEMINATES INFORMATION TO BE RATIONALLY RELATED TO A LEGITIMATE PURPOSE CONFLICTS WITH *SMITH v. DOE*.

As the Ninth Circuit acknowledged, Sheriff Arpaio also installed the internet cameras to "assur[e] accountability and public scrutiny" of the jail. Pet. App. 17a. And, although the court acknowledged that this was a legitimate government purpose, the court went on to hold that the internet broadcasts were not rationally related to this purpose because the "public exposure" on the internet was too "broad"; broadcasts would go to "internet users from around the world" and not just "the citizenry of Maricopa County." *Id.*

This holding could not more clearly conflict with this Court's holding in *Smith v. Doe*, where this Court rejected the argument (also made by the Ninth Circuit) that the "wide dissemination" over the internet of information about persons convicted of sex crimes and released from prison was "excessive in relation to its . . . purpose" to protect citizens in the State where the offender lived. 538 U.S. 84, 103-05 (2003). This Court held that, despite the unnecessarily broad dissemination, the internet broadcast was "reasonable" in connection to a "nonpunitive objective." *Id.* at 105.

Respondents raise two arguments in an attempt to explain away this conflict. First, they argue that the Ninth Circuit's holding is unique to "*the particular facts in this case*." Opp. at 10. But the only fact that is relevant to the question at hand—whether the internet's broadcast of information more widely than needed to serve a nonpunitive purpose makes the broadcast unreasonably related to that purpose—is whether the information was in fact broadcast over the internet. No one disputes this fact here, nor could respondents possibly dispute that this was also true in *Smith*. *See* 538 U.S. at 91, 105 (noting that "Alaska has chosen to make most of the nonconfidential information available on the Internet" and that "the information was available 'world-wide' and '[b]roadcas[t]' in an indiscriminate manner"). Thus, with regard to the facts relevant to this legal question, this case is indistinguishable from *Smith*.

Second, respondents argue that *Smith* involved a different provision of the Constitution (the Ex Post Facto Clause) than the one at issue here (the Due Process Clause). Opp. at 11. This is a distinction without a difference. This Court has noted that the test it uses under the Ex Post Facto Clause "appl[ies] in various constitutional contexts," *Smith*, 538 U.S.

at 97. One of those contexts is the substantive due process rights of pretrial detainees.[2]

In *Smith*, this Court held that a practice violates the Ex Post Facto Clause if it runs afoul of the factors "noted in *Kennedy v. Mendoza-Martinez*," including whether it has a "rational connection to a nonpunitive purpose . . . or is excessive with respect to this purpose." 538 U.S. at 97. This is the same test this Court applies in the context at issue here. In *Bell*, this Court held that a practice violates the substantive due process rights of pretrial detainees if it runs afoul of "[t]he factors identified in *Mendoza-Martinez*," including "whether the disability is imposed for the purpose of punishment" or whether "'an alternative purpose . . . may rationally be connected [to it], and whether it appears excessive in relation to the alternative purpose.'" 441 U.S at 538. Thus, it is clear that the Ninth Circuit's holding on this point conflicts with this Court's decision in *Smith*.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DUE PROCESS HOLDING IN *PAUL v. DAVIS*.

In *Paul v. Davis*, this Court held that the distribution of a flyer disclosing the public fact that the respondent had been arrested for shoplifting "did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause." *See* 424 U.S. 693, 712 (1976). The Ninth Circuit's conclusion that broadcasting images of respondents' activities in public areas of a jail violates one of the interests protected by the Due Process Clause is in direct conflict with *Paul*.

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[2] Respondents' attempt to distinguish *E.B. v. Vernerio*, 119 F.3d 1077, 1100 (3d Cir. 1997) ("[The] insistence that information regarding criminal proceedings be publicly disseminated is not intended as punishment and has never been regarded as such."), as a double jeopardy case, Opp. at 11, fails for the same reason. *See Smith*, 538 U.S. at 97 (noting that the test used in Ex Post Facto and pretrial detention cases also applies to "double jeopardy" cases.).

Respondents argue that this conflict can be explained away because *Paul* involved procedural due process while the Ninth Circuit's decision was based on substantive due process. Opp. at 14. This, again, is a distinction without a difference. There is only one Due Process Clause in the Constitution, and, although it accords both procedural and substantive protections to "liberty" and "property," it has never been held that the Clause accords substantive protection to some species of "liberty" or "property" for which it does not also accord procedural protection. Thus, in *Bell*, this Court made clear that the inquiry into whether a burden on a pretrial detainee constitutes punishment is simply the same inquiry conducted in *Paul*—*i.e.*, whether the right asserted fell "within the liberty of which no person may be deprived without due process of law." 441 U.S. at 535 n.17. Indeed, respondents' effort to distinguish *Paul* from *Bell* on this point was also made by the dissent in *Bell*, *see id.* at 580 & n.6 (Stevens, J., dissenting)—but, of course, was rejected by the majority, *see id.* at 535 n.17.

IV. THE EXISTENCE OF INTRACIRCUIT AS WELL AS INTERCIRCUIT SPLITS IS EVEN MORE REASON FOR THIS COURT TO RESOLVE WHETHER *TURNER* OR *BELL* APPLIES TO PRETRIAL DETAINEES.

As noted in the petition, courts and commentators have struggled with whether this Court's decision in *Bell* or this Court's later decision in *Turner v. Safley*, 482 U.S. 78 (1987), governs challenges by pretrial detainees to the conditions of their confinement, with three circuits applying *Bell* and two circuits applying *Turner*. Pet. 23-24.

Respondents argue that the two circuits applying *Turner* have now issued opinions applying *Bell*. Opp. at 7-9. But not only do these new opinions not overrule the previous decisions applying *Turner*, but they no where even consider whether *Turner* should have been applied instead of *Bell* (and respondents do not contend otherwise). The fact that there

are now intracircuit splits[3] in addition to intercircuit splits only exacerbates the need for this Court to resolve the confusion in the lower courts on this question. Indeed, the Ninth Circuit itself is confused about this issue, having previously applied *Turner* rather than *Bell* to challenges brought by pretrial detainees in another suit against Sheriff Arpaio. *See Mauro v. Arpaio*, 188 F.3d 1054, 1058-59 (9th Cir. 1999) (en banc).[4]

V. THE PROCEDURAL POSTURE OF THIS CASE DOES NOT DETRACT FROM THE WORTHINESS OF THIS CASE FOR THIS COURT'S REVIEW.

Notwithstanding these conflicts, respondents argue that this Court should deny the petition solely on the ground that the Ninth Circuit's decision was rendered on a motion for a preliminary injunction. Opp. at 15. But this Court routinely reviews preliminary injunctions. *See, e.g., Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783 (2004); *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003); *Department of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002); *Legal Servs. Corp. v. Velazquez*, 531

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[3] *Compare Hause v. Vaught*, 993 F.2d 1079, 1081-82 (4th Cir. 1993) (applying *Turner*), *and Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992) (same) *with Slade v. Hampton Roads Reg'l Jail*, 407 F.3d 243, 251 & n.7 (4th Cir. 2005) (applying *Bell*), *and Benjamin v. Fraser*, 343 F.3d 35, 49-50 (2d Cir. 2003) (same).

[4] Respondents contend that it would have made no difference if the Ninth Circuit had applied *Turner* rather than *Bell*. Opp. at 9 n.1. But, in addition to bringing greater uniformity to this Court's inmate jurisprudence by applying *Turner* to inmate claims across the board, applying *Turner* rather than *Bell* provides jailers with more flexibility. Under *Bell*, a condition of confinement is unconstitutional as soon as a judge decides it constitutes punishment, regardless of the importance of the state interest involved. Under *Turner*, by contrast, a court is required to weigh the state's penological interest before declaring a condition of confinement unconstitutional.

U.S. 533 (2001). Thus, the procedural posture of this case is obviously no bar to this Court's review.

Nor have respondents explained why the procedural posture in this case poses any special obstacle to review. Respondents argue that the "district court made no formal factual findings," Opp. at 15, but this simply proves that the petition poses purely legal questions of the sort that ordinarily make up the docket of this Court.

Respondents further argue that "factual issues remain unexamined," including "the nature of Arpaio's contract with the Crime.com website." Opp. at 15-16. But respondents do not explain and it is not apparent why any legal question decided by the Ninth Circuit would be affected by the nature of this contract. Respondents also contend that there is a factual dispute between the parties over whether the cameras were placed only in "public areas" of the jail or whether some of the areas were "non-public." Opp. at 16. But respondents elsewhere concede that the cameras were placed in areas of the jail that were "'open to the public . . . through prearranged tours.'" *Id.* at 3.[5] Moreover, this factual issue is not central to the legal questions presented. For instance, the holding below that general deterrence constitutes an illegitimate government purpose does not turn in any way on where the cameras were placed.

Finally, respondents argue that this Court should not review this case because, they say, "no other jailer in the United States has done what petitioner has done here," Opp. at 1, and, "[t]here is therefore no reason to believe that the question presented will recur," *id.* at 16-17. A quick search of the internet, however, shows otherwise. *See* Anderson County Tennessee Sheriff's Dep't, *Anderson County*

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[5] Nothing can be made of the fact that the public had access to these areas through "prearranged tours" because, for obvious reasons, members of the public are not usually given free reign to walk wherever they wish in places like jails and prisons.

Detention Facility Jail Cam, *at* http://www.tnacso.net/cont/jailcam.php (last visited June 6, 2005). Moreover, the Ninth Circuit's erroneous holding likely has deterred other jails from using such cameras.

In any event, the Ninth Circuit's holdings on what constitutes punishment and what government purposes are legitimate have broad application to many other contexts. For example, some police departments publish the names and pictures of those arrested for soliciting prostitution in the newspaper. One of these departments is in Ingelwood, California, and it apparently adopted this practice in order to deter the reading public from soliciting prostitution (*i.e.*, for general deterrence). *See Inglewood Police Arrest 15 Men During Prostitution Crackdown*, Torrance County Daily Breeze, Apr. 15, 2005, at A4 ("The Inglewood Police Department has implemented a policy to post the names of individuals arrested during anti-prostitution operations to deter this type of activity in the city."). This, and any number of similar practices, would appear now to be unconstitutional under the Ninth Circuit's ruling.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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June 6, 2005